141-408

141-408

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~32~~ 34

ROSE H. FOWLER, APPELLANT,

vs.

THE EQUITABLE TRUST COMPANY.

No. ~~33~~ 35

THE EQUITABLE TRUST COMPANY, APPELLANT,

vs.

ROSE H. FOWLER ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 4, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 322.

ROSE H. FOWLER, APPELLANT,

vs.

THE EQUITABLE TRUST COMPANY.

No. 323.

THE EQUITABLE TRUST COMPANY, APPELLANT,

vs.

ROSE H. FOWLER ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Bill of complaint	3	2
Real-estate mortgage bond No. 3058	4	2
3059	6	4
3060	10	5
3061	12	6
3062	15	8
3063	18	9
Deed of trust from Rose H. Fowler to Jonathan Edwards, May 1, 1874	27	13
Subpœna	42	20
Marshal's return	42½	20
Appearance for Rose H. Fowler	43	21
Order granting leave to answer	43	21
Answer of Rose H. Fowler	44	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1891.

	Original.	Print.
Answer of Sophie Fowler	49	24
Cross-bill of Sophie Fowler	52	25
Exhibit A—Deed between Rose H. Fowler and Sophie Fowler, August 4, 1881	57	26
B—Promissory note of Rose H. Fowler to Sophie Fowler, August 4, 1881	61	28
Appearance of Bond and Johnston	62	28
Refusal of Bond to act as trustee	63	29
Refusal of Johnston to act as trustee	63	29
Replication to answers to bill	64	29
Answer of Trust Co. to cross bill	65	30
Order entering default of Bond and Johnston and referring cause to master	71	32
Report of master of amount due	72	33
Rule on defendants to close testimony	73	34
Order granting leave to amend answer	73	34
Amended answer of Rose H. Fowler	74	34
Order appointing H. W. Taft special commissioner	77	35
Deposition of Robert P. Johnston	78	36
Exhibit A—Application of Rose H. Fowler for loan, June 6, 1874	83	38
Diagram	85	39
B—Letter of R. P. Johnston, agent, to Jonathan Edwards, president, June 22, 1874	85	39
C—Draft of R. P. Johnston to order of Rose H. Fowler, June 23, 1874	86	39
Deposition of John Marvin	88	40
Edwin S. Fowler	94	43
Exhibit A—Computation of interest, &c.	103	49
B—Letter to Dr. Edwin S. Fowler, July 1, 1881	104	50
C—Receipt to Dr. Edwin S. Fowler, January 30, 1882	104	50
D—Statement of account, August 14, 1882	105	50
E—Statement of account, July 1, 1881	106	51
Decree of October 20, 1884	107	52
Motion for rehearing	113	54
Petition for rehearing	114	54
Order for hearing before full bench	117	56
Order granting rehearing before full bench	117	56
Supplemental report of master	118	56
Final decree	119	57
Allowance of appeals	125	59
Appeal bond of defendants	127	59
Appeal bond of complainant	128	60
Clerk's certificate	130	61

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, before the Hon. Walter Q. Gresham, judge of the seventh judicial circuit, presiding, and the Hon. Samuel H. Treat, district judge of said district, associate judge, on Tuesday, the eleventh day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and eleventh year.

J. A. JONES, *Clerk.*

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER, SOPHIE FOWLER, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

The Equitable Trust Company, a corporation organized and doing business under and by virtue of the laws of the State of Connecticut, brings this its bill by W. L. Gross, Esq., its solicitor, against Rose H. Fowler, Sophie Fowler, Henry R. Bond, and Robert P.
2 Johnston, defendants, at the suit of complainant in the bill aforesaid.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the twenty-seventh day of October, in the year of our Lord one thousand eight hundred and eighty-two, came the said complainant, by its solicitor, and filed in the clerk's office of said court its bond for costs, bill, and deed of trust in the above-entitled cause, which are in the words and figures following, to wit:

Bond for Costs.

Circuit Court of the United States of America, Southern District of Illinois, *ss.* June Term, A. D. 1882.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER *et al.* } In Chancery.

I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 27th day of October, 1882.

WILLIAM L. GROSS.

(Endorsed:) Filed October 27, A. D. 1882. J. A. Jones, clerk.

3 *Bill of Complaint.*

To the judges of the circuit court of the United States for the southern district of Illinois:

The Equitable Trust Company, a corporation organized and doing business under and by virtue of the laws of the State of Connecticut, with its principal place of business in the city of New London, in said State of Connecticut, and with a branch office at No. 16 Exchange Place, in the city of New York, in the State of New York, a citizen of the State of Connecticut, brings this its bill against Rose H. Fowler, a citizen of the southern district of Illinois, and Sophie Fowler, a citizen of the southern district of Illinois; Henry R. Bond, a citizen of the State of Connecticut, and Robert P. Johnston, of St. Louis, a citizen of the State of Missouri. And thereupon your orator complains and says that on the first day of May, A. D. 1874, one Rose H. Fowler, being justly indebted unto your orator in the full sum of six thousand dollars for borrowed money, made and delivered to your orator her six certain coupon mortgage bonds, for the sum — one thousand dollars each, of that date, and thereby bound herself to pay unto your orator, at the city of New York, on the first day of May, A. D. 1879, said principal sum of six thousand dollars, with interest thereon after the maturity thereof at the rate
4 of ten per centum per annum, payable semi-annually on the first days of November and May in each year until paid, and which said mortgage bonds are in the words and figures following, to wit:

UNITED STATES OF AMERICA.

1000. Number 3058. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

Know all men by these presents, That I, Rose H. Fowler, of the county of Sangamon, State of Illinois, am justly indebted to the Equitable Trust Company of New London Connecticut in the sum of one thousand dollars lawful money of the United States which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or if not registered, to bearer on the first day of May, A. D. 1879 together with interest thereon, from and after the date hereof at the rate of seven per cent. per annum at the office of the Equitable Trust Company in the city of New York on the first day of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof.

5 This bond shall pass by delivery, or by transfer on the books of the company in the city of New York. No transfer, except

on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, at once become due and payable, anything hereinbefore contained to the contrary notwithstanding; such election to be made at any time after the expiration of said ten days without notice.

It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises insured to the amount of $6,000.00 and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield Illinois this first day of May, A. D. 1874.

ROSE H. FOWLER. [L. S.].

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond according to the terms thereof.

[Seal of Equitable Trust Company, Conn.]

EQUITABLE TRUST COMPANY,
By JONATHAN EDWARDS, *Pres't.*

[Written across the face:]. Guarantee of Equitable Trust Company is cancelled.

[Written across the face:]. Guarantee of Equitable Trust Company is cancelled.

[Written across the face:]. Guarantee of Equitable Trust Company is cancelled.

(M.) This bond is one of six bonds, amounting in the aggregate to six thousand dollars given for an actual loan of money made by the Equitable Trust Company to Rose H. Fowler and secured by a mortgage from Rose H. Fowler to Jonathan Edwards, trustee, of New York, duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois, valued at not less than eighteen thousand dollars. (M.)

UNITED STATES OF AMERICA.

1000. Number 3059. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London, Connecticut.

7 Know all men by these presents, That I, Rose H. Fowler of the county of Sangamon, State of Illinois am justly indebted to the Equitable Trust Company of New London Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company, or to the registered holder hereof, or, if not registered, to bearer on the first day of May A. D. 1879 together with interest thereon from and after the date hereof at the rate of seven per cent. per annum at the office of the Equitable Trust Company in the city of New York on the first day of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due, as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof. This bond shall pass by delivery, or by transfer on the books of the company in the city of New York. No transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is herein expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid when and where the same shall become
8 due and payable and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof, at once become due and payable anything hereinbefore contained to the contrary notwithstanding; such election to be made at any time after the expiration of said ten days without notice. It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond; or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises insured to the amount of $6,000.00 and the insurance policies properly assigned to Jonathan Edwards trustee, then and in that event the said principal sum of one thousand dollars shall, at the election of the legal holder hereof, become due and payable, anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield Illinois this first day of May A. D. 1874.

ROSE H. FOWLER. [L. S.]

For value received the Equitable Trust Company hereby guar-

antees the paymentof the principal and interest of the above bond according to the terms thereof.

[Seal of Equitable Trust Company, Conn.]

EQUITABLE TRUST COMPANY,
By JONATHAN EDWARDS, *Pres't.*

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

9 (M.) This bond is one of six bonds, amounting in the aggregate to six thousand dollars given for an actual loan of money made by the Equitable Trust Company to Rose H. Fowler and secured by a mortgage from Rose H. Fowler to Jonathan Edwards trustee, of New York duly recorded, and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois, valued at not less than eighteen thousand dollars. (M.)

10 UNITED STATES OF AMERICA.

1000. Number 3060. 1000.

Real-estate mortgage bond.

Negotiated, and guaranteed by the Equitable Trust Company of New London Connecticut.

Know all men by these presents, That I, Rose H. Fowler of the county of Sangamon State of Illinois — justly indebted to the Equitable Trust Company of New London Connecticut in the sum of one thousand dollars lawful money of the United States which sum I promise to pay to the Equitable Trust Company or to the registered holder hereof, or, if not registered, to the bearer on the first day of May A. D. 1879, together with interest thereon from and after the date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company in the city of New York on the first day of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due as provided herein, and at the rate of ten per cent. thereon after default of payment of the principal hereof. This bond shall pass by delivery, or by transfer on the books of the company in the city of New York. No transfer except on the books of the company shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder
11 thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed, that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable,

and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof at once become due and payable anything hereinbefore contained to the contrary notwithstanding; such election to be made at any time after the expiration of said ten days without notice. It is further expressly agreed that if at any time until the principal shall be fully paid, the premises made security for this bond, or any portion thereof shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises insured to the amount of $6,000.00 and the insurance policies properly assigned to Jonathan Edwards trustee, then and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof become due and payable, anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal
12 at Springfield Illinois this first day of May, A. D. 1874.

ROSE H. FOWLER. [L. S.]

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond according to the terms thereof.

[Seal of Equitable Trust Company, Conn.]

EQUITABLE TRUST COMPANY,
By JONATHAN EDWARDS, *Pres't.*

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

(M.) This bond is one of six bonds, amounting in the aggregate to six thousand dollars given for an actual loan of money made by the Equitable Trust Company to Rose H. Fowler and secured by a mortgage from Rose H. Fowler to Jonathan Edwards, trustee, of New York duly recorded and conveying property situated in the town of Springfield, county of Sangamon and State of Illinois, valued at not less than eighteen thousand dollars. (M.)

UNITED STATES OF AMERICA.

1000. Number 3061. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London Connecticut.

Know all men by these presents that I, Rose H. Fowler of the county of Sangamon, State of Illinois am justly indebted to the Equitable

Trust Company of New London Connecticut in the sum of one
13 thousand dollars lawful money of the United States which sum I promise to pay to the Equitable Trust Company or to the registered holder hereof, or if not registered, to bearer on the first day of May A. D. 1879 together with interest thereon from and after the date hereof, at the rate of seven per cent. per annum at the office of the Equitable Trust Company in the city of New York on the first day of May and November in each year, on presentation and surrender of the annexed interest coupons as they shall severally become due as provided herein, and at the rate of ten per cent thereon after default of payment of the principal hereof. This bond shall pass by delivery, or by transfer on the books of the company in the city of New York. No transfer except on the books of the company shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid, when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and
14 payable as aforesaid, then, and in that event the said principal sum of one thousand dollars, shall, at the election of the legal holder hereof, at once become due and payable, anything hereinbefore contained to the contrary notwithstanding: such election to be made at any time after the expiration of said ten days without notice. It is further expressly agreed, that if at any time until the principal shall be fully paid the premises made security for this bond or any portion thereof, shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises insured to the amount of $6,000.00 and the insurance policies properly assigned to Jonathan Edwards, trustee, then and in that event the said principal sum of one thousand dollars, shall at the election of the legal holder hereof, become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield Illinois this first day of May A. D. 1874.

ROSE H. FOWLER. [L. S.]

Seal of Equitable Trust Company, Conn.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond according to the terms thereof.

EQUITABLE TRUST COMPANY,
By JONATHAN EDWARDS, *Pres't.*

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

15 (M.) This bond is one of six bonds amounting in the aggregate to six thousand dollars given for an actual loan of money made by the Equitable Trust Company to Rose H. Fowler and secured by a mortgage from Rose H. Fowler to Jonathan Edwards trustee, of New York, duly recorded, and conveying property situated in the town of Springfield county of Sangamon and State of Illinois, valued at not less than eighteen thousand dollars. (M.)

UNITED STATES OF AMERICA.

1000. Number 3062. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London Connecticut.

Know all men by these presents that I Rose H. Fowler of the county of Sangamon, State of Illinois am justly indebted to the Equitable Trust Company of New London Connecticut in the sum of one thousand dollars lawful money of the United States, which sum I promise to pay to the Equitable Trust Company or to the registered holder hereof, or if not registered, to bearer on the first day of May A. D. 1879 together with interest thereon from and after the date hereof at the rate of seven per cent. per annum at the office of the Equitable Trust Company in the city of New York on the first day of May and November in each year, on pre-
16 sentation and surrender of the annexed interest coupons as they shall severally become due as provided herein, and at the rate of ten per cent. thereon, after default of payment of the principal hereof. This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer except on the books of the company shall be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid when and where the same shall become due and payable and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof at once become due and payable anything hereinbefore contained to the contrary notwithstanding: such election to be made at any time after the expiration of said ten days without notice. It is further expressly agreed that if at any time until the principal shall
17 be fully paid, the premises made security for this bond or any portion thereof shall be sold for any tax or assessment whatso-

ever, or the undersigned shall fail to keep the said premises insured to the amount of $6,000.00 and the insurance properly assigned to Jonathan Edwards trustee then and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof become due and payable anything hereinbefore contained to the contrary notwithstanding.

In witness whereof I have hereto affixed my hand and seal at Springfield Illinois this first day of May A. D. 1874.

ROSE H. FOWLER. [L. S.]

Seal of Equitable Trust Company, Conn.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond according to the terms thereof.

EQUITABLE TRUST COMPANY,
By JONATHAN EDWARDS, *Pres't.*

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

(M.) This bond is one of six bonds amounting in the aggregate to six thousand dollars given for an actual loan of money made by the Equitable Trust Company to Rose H. Fowler and secured by a mortgage from Rose H. Fowler to Jonathan Edwards trustee, of New York duly recorded, and conveying property situated in the town of Springfield, county of Sangamon and State of Illi-
18 nois, valued at not less than eighteen thousand dollars. (M.)

UNITED STATES OF AMERICA.

1000. Number 3063. 1000.

Real-estate mortgage bond.

Negotiated and guaranteed by the Equitable Trust Company of New London Connecticut.

Know all men by these presents, that I, Rose H. Fowler of the county of Sangamon, State of Illinois, — justly indebted to the Equitable Trust Company of New London Connecticut in the sum of one thousand dollars lawful money of the United States which sum I promise to pay to the Equitable Trust Company or to the registered holder hereof, or if not registered to bearer on the first day of May A. D. 1879 together with interest thereon from and after the date hereof, at the rate of seven per cent. per annum, at the office of the Equitable Trust Company in the city of New York on the first day of May and November in each year, on presentation and surrender of the an-

nexed interest coupons as they shall severally become due as provided herein, and at the rate of ten per cent: thereon after default of payment of the principal hereof. This bond shall pass by delivery or by transfer on the books of the company in the city of New York. No transfer on the books of the company shall
19 be valid unless the last transfer shall have been to bearer. This bond shall be subject to registration or transferable to bearer at the option of any lawful holder thereof. This bond shall not be negotiable until guaranteed by the Equitable Trust Company under its seal. It is hereby expressly agreed that if default be made in the payment of any one of the installments of interest aforesaid at the time and place aforesaid when and where the same shall become due and payable, and such default shall continue for ten days after such installment becomes due and payable as aforesaid, then, and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof at once become due and payable, anything hereinbefore contained to the contrary notwithstanding: such election to be made at any time after the expiration of said ten days, without notice. It is further expressly agreed that if at any time until the principal shall be fully paid the premises made security for this bond or any part thereof shall be sold for any tax or assessment whatsoever, or the undersigned shall fail to keep the said premises insured to the amount of $6,000.00 and the insurance properly assigned to Jonathan Edwards trustee, then and in that event the said principal sum of one thousand dollars shall at the election of the legal holder hereof become due and payable, anything
20 hereinbefore contained to the contrary notwithstanding.'

In witness whereof I have hereto affixed my hand and seal at Springfield Illinois this first day of May A. D. 1874.

ROSE H. FOWLER. [L. S.]

Seal of Equitable Trust Company, Conn.

For value received the Equitable Trust Company hereby guarantees the payment of the principal and interest of the above bond according to the terms thereof.

EQUITABLE TRUST COMPANY,
By JONATHAN EDWARDS, *Pres't.*

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

[Written across the face:] Guarantee of Equitable Trust Company is cancelled.

(M.) This bond is one of six bonds amounting in the aggregate to six thousand dollars given for an actual loan of money made by the Equitable Trust Company to Rose H. Fowler and secured by a mortgage from Rose H. Fowler to Jonathan Edwards trustee, of New York, duly recorded, and conveying property situated in the town of Springfield county of Sangamon and State of Illinois valued at not less than eighteen thousand dollars. (M.)

Your orator shows that to secure the payment of the principal sum expressed in the said six mortgage bonds and the interest accruing thereon the — Rose H. Fowler on the same day, May 1st, 1874, by her deed of trust of that date, conveyed to one Jonathan Edwards, of the city of New York, in fee simple and with full covenants against the rights of homestead, etc., the following-described real estate,
21 with the appurtenances thereto belonging, to wit: All of those certain lots, pieces, and parcels of land situate, lying, and being in the city of Springfield, county of Sangamon, and State of Illinois— that is to say: Lots nine (9), ten (10), eleven (11), and twelve (12), in Constant's Second Addition to Springfield—

In trust, nevertheless, for the purpose of securing the principal sum expressed in said six mortgage bonds and interest thereon so due to your orator as aforesaid and subject to conditions of defeasance upon the payment of the said principal sum and interest according to the effect of the said mortgage bonds, and which deed of trust was, on the twenty-second day of June, A. D. 1874, duly acknowledged, and afterwards, on the twenty-third day June, A. D. 1874, filed for record in the recorder's office of the county of Sangamon aforesaid, as — by the said deed of trust and its accompanying certificates of acknowledgement and recording, ready to be produced in court and now here shown and exhibited and made part of this bill.

Your orator shows in said deed of trust it was, among other things, provided that in case of the death of the trustee therein named, Jonathan Edwards, one Henry R. Bond, of New London, Connecticut, should become the successor in trust, be invested with the title to the premises, and having like powers and authority in the premises; and in case of the refusal to act of the said successor trustee, Henry
22 R. Bond, one Robert P. Johnston, then of Springfield, Illinois, should thereupon become the successor in trust of the said Jonathan Edwards and Henry R. Bond, be in like manner invested with the title to the said premises and with like powers and authority in the premises.

Your orator shows that in said deed of trust it was further provided that upon default of the said principal sum of money or the interest accrued thereon the said trustee or his successor in trust was authorized & empowered, after notice in the manner directed, to make sale of the said mortgaged premises, and, in that event, from the proceeds of such sale to pay all the costs, charges, & expenses of such advertisement, sale, and conveyance, including such a commission as by the laws of Illinois the sheriff of Sangamon county is allowed on sale of real estate on execution, and to the legal holder of said mortgage bonds all such sums of money as such legal holder should pay out to redeem said premises from any sale for taxes levied or assessed upon said premises or to save the said premises from sale on account thereof, and to such legal holder of said mortgage bonds such further sums of money as such legal holder should have to pay out to keep the buildings upon said premises insured against loss or damage by fire, with interest at the rate of ten per cent. per annum upon all such sums of money so disbursed from the time or times of payment respectively.

23 Your orator shows and charges that the said Rose H. Fowler did not, nor did or has any one for her, pay to your orator, at the city of New York or elsewhere, the whole or any part of said principal sum of six thousand dollars expressed in said mortgage bonds on the first day of May, A. D. 1879, nor yet upon any day subsequent when by the terms of the said mortgage bonds the same became due and payable, and that the same remains and is now wholly unpaid; nor did or has the said Rose H. Fowler or any one for her paid to your orator, at the city of New York or elsewhere, the interest accruing upon the principal of said mortgage bonds from and since the said bonds matured and became due and payable, but the same remains and now is wholly unpaid; nor did the said Rose H. Fowler keep the buildings upon said premises insured against loss or damage by fire, whereby your orator was compelled to pay and did pay, on the 26th July, 1882, as premium for the insurance of the buildings upon said premises the sum of $20.37.

Your orator shows and charges that Jonathan Edwards, the trustee named and appointed in said deed of trust, departed this life on or about May 30th, A. D. 1882, and that the successor trustees, Henry R. Bond and Robert P. Johnston respectively, have

24 and do refuse to act as such and to exercise the powers and authority in them vested in and by said deed of trust, whereby resort to a court of equity is rendered necessary to divest the said trustees of the legal title in them vested by said deed of trust; that, resort to equity being thus necessary, your orator is equitably entitled to recover, as a part of his expenses of foreclosure and in lieu of the usual solicitor's fee, a commission upon the amount found to be due to your orator equal to that allowed the sheriff of Sangamon county by the laws of Illinois on sales of real estate on execution.

Your orator shows and charges that before proceedings under this bill can proceed to decree and sale the taxes levied & assessed upon said premises for the year 1882 for State, county, town, and city purposes and now already levied will, by virtue of the revenue laws of the State of Illinois, become a lien upon the said premises and be due and payable, and that to save the said premises from sale on account thereof and protect your orator's rights in the premises your orator will be compelled to pay the same; for which payment when so made and for all sums of money so expended, with interest thereon from the time of payment, at the rate of ten per cent. per annum, your orator is equitably entitled to reimbursement out of the proceeds of the sale of said premises and for which your orator's equitable lien upon said premises is ample and complete.

25 Your orator shows & charges that Sophie Fowler, of Springfield, Illinois, as your orator is informed, claims some title or interest in the said mortgaged premises hereinbefore described, the extent and nature of which is to your orator unknown, but which orator charges is junior and subordinate to the rights and equities of your orator in the premises.

Wherefore, as orator charges, the said mortgaged premises has become forfeited, subject, nevertheless, to redemption in equity.

Your orator therefore asks the aid of this court in the premises, and makes the said Rose H. Fowler, Sophie Fowler, Henry R. Bond, and Robert P. Johnston parties defendant to this bill, to the end that they may be required to answer the same according to the rules and practice of this court, but not under oath, their answers under oath being hereby waived; that an account may be taken, under the direction of the court, of the amount found to be due to your orator on the first day of May, A. D. 1879, principal of said six mortgage bonds, and the interest thereon accrued from and since that date, as also the amount of a reasonable solicitor's fee, equal to the commission (upon the sum found to be due unto your orator) allowed by the laws of the State of Illinois to the sheriff of Sangamon county on sales of real estate on execution, together with the amount
26 paid out by your orator as premiums for insurance upon the buildings on said premises and for taxes on said premises, with interest on such payments from the time paid at the rate of ten per cent. per annum; that the said defendants may be decreed to pay to your orator the full sum that shall appear on such accounting to be due to it, including the solicitor's fee aforesaid and the costs of this proceeding, by a short day to be fixed by the court; that in default of such payment the said mortgaged premises may be sold, as directed by the court, to satisfy the amount due and costs; that, in case of such sale and a failure to redeem therefrom pursuant to the statute of the State of Illinois in such case provided, the defendants and all persons claiming through or under them subsequent to the commencement of this suit may be forever barred and foreclosed of all right and equity of redemption in the said premises, and that your orator may have such other and further relief in the premises as equity may require and to your honors may seem meet; and may it please your honors to grant unto your orator the usual writ of subpœna in chancery, issuing according to the rules and practice of this court, requiring the said defendants and each of them,
27 on a day certain to be therein named, personally to appear in this cause and make answer as aforesaid, and to stand to and abide such order and decree herein as may be entered in this cause.

EQUITABLE TRUST COMPANY,
By W. L. GROSS, *Its Solicitor.*

W. L. GROSS,
Comp't's Sol'r, Springfield, Ills.

(Indorsed:) Filed October 27, 1882. J. A. Jones, clerk.

Deed of Trust.

This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and seventy-four (1874), between Rose H. Fowler, of the county of Sangamon and State of Illinois, of the first part, and Jonathan Edwards, trustee, of the city, county, and State of New York, of the second part, witnesseth:

That whereas the said Rose H. Fowler is justly indebted unto the Equitable Trust Company of New London, Connecticut, in the principal sum of six thousand dollars, lawful money of the United States of America, being for a loan thereof, on the day of the date hereof, made by said Equitable Trust Company to said Rose H. Fowler, secured to be paid by six certain coupon mortgage bonds of the said Rose H. Fowler, bearing even date herewith, payable to the
28 said Equitable Trust Company of New London, Connecticut, or bearer, or, if registered, to the registered holder thereof, in and by which said Rose H. Fowler promises to pay to the said Equitable Trust Company of New London, Connecticut, the principal sum of six thousand dollars five years after date thereof, with interest thereon at the rate of seven (7) per cent. per annum, payable semi-annually, on the first day of May & November in each year, until said principal sum is fully paid, and both principal and interest payable at the office of the Equitable Trust Company, in the city of New York; which said several installments of interest for said period of five years are further evidenced by sixty interest coupons of even date herewith, payable to the Equitable Trust Company or bearer, or the registered holder thereof, as appears by such coupons, each of them for the sum of thirty-five (35) dollars, and payable as follows, viz., six of them on the first day of May in each year and six of them on first day of November in each year until said principal sum is fully paid, at the office of the Equitable Trust Company, in the city of New York, in and by which said bonds it is agreed that if default be made in the payment of any one of installments of interest aforesaid at the time and place when and where the same becomes due and payable as aforesaid, and
29 such default shall continue for three days after such installment becomes due and payable as aforesaid, then, at the election of the legal holder of said bonds, the said principal sum of six thousand dollars shall at once become due and payable, anything thereinbefore contained to the contrary notwithstanding, such election to be made at any time after the expiration of said three days without notice; and which said bonds for six thousand ($6,000.00) dollars were given to secure a loan of that amount, payable five years after the date thereof, with interest at ten per cent. per annum, payable semi-annually, of which said interest seven (7) per cent. per annum is secured by this trust deed and is to be paid as in said bond provided, and the balance, to wit, three per cent. per annum, has been discounted, and the same, less the discount thereon, paid at the time of the execution of these presents:

Now, therefore, the said party of the first part, for the better securing the payment of the said sum of money mentioned in said coupon mortgage notes, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed, and confirmed,
30 and by these presents does grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part

and his successors in trust and assigns forever all the certain lot, piece, or parcel of land situate, lying, and being in the city of Springfield, county of Sangamon, in the State of Illinois, known and described as follows, to wit: Lots No. nine (9), ten (10), eleven (11), and twelve (12), in Constant's Second Addition to Springfield, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the same and every part and parcel thereof, with the appurtenances; to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his successors in trust and assigns forever.

In trust, nevertheless, that if default shall be made in the payment of the said principal sum of money above mentioned (whether the same shall have become due by election as aforesaid or
31 by the regular maturity of said bonds five years after date thereof) or of said interest coupons or any of them, or if the said Rose H. Fowler shall at any time hereafter until the said principal sum and all arrearages of interest thereon shall be fully paid suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, or shall do or permit to be done to, in, upon, or about said premises or any part thereof anything that may in anywise tend to diminish the value thereof or to impair, weaken, or diminish the security intended to be effected under and by virtue of this instrument, or shall neglect or fail to keep all the buildings except outhouses that now are or hereafter may be situate upon said premises insured and cause such insurance to be made payable in case of loss to said party of the second part or his successors in trust, and the policies of insurance and all renewal certificates thereof to be delivered to him or them, as hereinafter covenanted and provided, or shall fail in anywise promptly and faithfully to fulfill, keep, and perform all and singular the covenants and agreements contained in these presents by her or them to be kept and performed, then and from thenceforth it shall be lawful for the said party of the second part or his successors in trust, with or without a previous entry upon said premises, to sell and dispose of said premises hereby granted or intended so to be, and all right,
32 title, benefit, and equity of redemption of said party of the first part, her — and assigns, therein at public auction to the highest bidder, for cash, having first given thirty days' notice of the time and place of such sale (such sale to be made at the front door of the court-house of the county of Sangamon and State of Illinois, by advertizement in any one of the daily newspapers that may at that time be published in the English language in said Sangamon county), personal notice of such sale to said party of the first part, Rose H. Fowler, or assigns, or any persons claiming by, through, or under her being expressly waived and excused, and

in the name of the said party of the second part or his successors in trust to make, execute, and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance in the law for the premises sold in fee simple; and all the recitals that may be contained in such deed or deeds setting forth the fact of such default as aforesaid, due notice, advertizement, and sale and any and all such other facts and statements as may be proper to evidence the legality of such sale and conveyance, and that the same has been duly made in all respects so as to meet all the requirements herein contained or arising in law, and as may be necessary to convey a good title, shall be deemed to be
33 true, and shall be considered and taken on all occasions and as between all persons as *prima facie* evidence of the truth of all the facts and matters set forth in such recitals, and such deed or deeds shall be effectual to pass the title and all the right and equity of redemption of said party of the first part, Rose H. Fowler, and assigns, in and to the premises sold; and out of the money arising from such sale the said party of the second part or his successors in trust shall pay—

First. All costs, charges, and expenses of such advertizement, sale, and conveyance, including commissions such as are at the time of such sale allowed by the laws of Illinois to sheriffs on sale of real estate on execution in said Sangamon county.

Second. All premium money paid for any insurance, as hereinafter provided, and all money and sums of money which said party of the second part or his successors in trust or the legal holder of said bonds may at any time before such sale pay or expend to redeem said above-described premises from any sale or sales for taxes or assessments or to save the same from sale on account thereof or to protect the title or possession of said premises or any part thereof, with interest on all money so advanced or expended, at the rate of ten per centum per annum, from the time of so paying or expending the same up to the time of such sale.

34 Third. All of said princip- money first hereinbefore mentioned and the accrued interest thereon that shall at the time of such sale remain unpaid; and,

Fourth. Render the overplus of the purchase-money, if any there be, unto the said Rose H. Fowler, her executors, administrators, or assigns, on reasonable request.

And it shall not be obligatory upon the purchaser or purchasers at such sale to see to the application of the purchase-money; which sale or sales so made shall be a perpetual bar, both in law and equity, against the said party of the first part, her heirs and assigns, and all other persons claiming or to claim the said premises or any part thereof by, from, or under them or any of them.

And the said party of the first part, for the purpose of enabling said party of the second part and his successors in trust to make an advantageous and judicious sale of said premises, do hereby authorize and empower him or them to adjourn said sale from time to time at his or their discretion, of which adjourned sale it shall be sufficient to give ten days' notice by advertizement in such newspaper as aforesaid,

the first publication whereof to be on the day following the day on which, but for such adjournment, said sale should have taken
35 place; and the party of the second part or his successors in trust need not go to the said place of sale to announce such adjournment; and at such sale said party of the second part or his successors in trust may sell said premises entire, without division, or in parcels, as he or they may elect.

And the said party of the first part, for the consideration above mentioned, do hereby expressly waive and release all right and benefit which they have or to which they may be entitled in and to said premises and the proceeds of sale thereof under and by virtue of an act of the General Assembly of the State of Illinois entitled An act to exempt homesteads from sale on execution, approved Feb. 11, 1851, and an act to amend said act, approved Feb. 17, 1857, as well as under any and all other acts of said General Assembly of a like character or for a similar purpose, and agree to surrender possession of said premises to the purchaser or purchasers at such sale peaceably on demand.

And the said Rose H. Fowler, for herself, her heirs, administrators, and assigns, does covenant, bargain, and agree to and with the said party of the second part, his successors in trust and assigns, that she, the said Rose H. Fowler, is well seized of the premises above described as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same
36 in manner and form as aforesaid, and that the same are free from all other and former grants, mortgages, liens, encumbrances and from taxes, assessments, and sales therefor of any name, kind, nature, or description whatsoever, and the same in the peaceable and quiet possession of the party of the second part, his successors in trust, his and their assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, she will warrant and forever defend.

And the said Rose H. Fowler, for herself, her heirs and assigns, does covenant, grant, and agree to and with the said party of the second part and his successors in trust that she will well and truly pay the principal sum of money and interest thereon mentioned in said bonds according to the tenor and effect thereof, and will not at any time hereafter until the said principal sum and the interest thereon shall be fully paid suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, nor do nor permit to be done to, in, upon, or about said premises anything that may in anywise tend to impair the value thereof or to weaken, diminish, or impair the security intended to be effected under and by virtue of this instrument; and, further, that said Rose H. Fowler and assigns shall
37 and will at all times hereafter until said principal sum of money and all arrearages of interest thereon shall be fully paid keep all the buildings, outhouses excepted, now situate or that may hereafter be erected upon said premises fully insured against loss or damage by fire in some good and responsible insurance company or companies (the selection of such insurance company or companies

to be left to the option of the said party of the second part or his successors in trust) in the fair insurable value of such buildings, and cause such insurance to be made payable, in case of loss, to the said party of the second part or his successors in trust and deliver to him or them each, all, and every the policies of insurance therefor as soon as and whenever such insurance shall be effected and all renewal certificates of such policies, and in default of so doing the said party of the second part or his successors in trust, at his or their option, may effect such insurance in his or their own name or names or otherwise, and the premium money paid therefor shall be a charge upon said premises and shall be, and is hereby declared to be, secured by this instrument in the same manner as the said principal sum of money above mentioned is secured, and such premium money shall be paid by said Rose H. Fowler to the said party of the second part or his successors in trust on demand and may
38 be collected at any time after the same shall have been paid, with interest thereon, at the rate of ten per centum per annum, from the time the same shall be advanced, and the said party of the second part or his successors in trust shall hold each and all such policies of insurance as collateral and additional security for said principal sum of money and interest and shall have the right to collect and receive any and all money and sums of money that may at any time become collectable or receivable upon each, all, and every of such policies of insurance and apply the same, when received, in the same manner, as far as possible, as is hereinbefore provided for the application of the proceeds of a sale of said above-described premises under the power of sale hereinbefore contained; but nothing herein contained shall be construed as requiring the said party of the second part or his successors in trust to incur any expense or make any effort to collect any money that may become due on any of such policies of insurance, but if he or they shall elect not to collect the same he or they shall make such election within a reasonable time after such money shall become collectable, and on demand of said Rose H. Fowler, her heirs, executors, or assigns, shall thereupon forthwith, after making such election not to collect, execute any necessary order or assignment to cause said insurance
39 money to be paid to said Rose H. Fowler or assigns.

A reconveyance of said premises shall be made by the party of the second part or his successors in trust to said Rose H. Fowler or assigns, at her expense, on full payment of the indebtedness aforesaid and performance of the covenants and agreements made herein by the party of the first part.

And in case of the death, absence from the United States, inability or refusal to act of the said party of the second part at any time when his action under the foregoing powers and trusts may be required, then Henry R. Bond, of New London, Conn., shall be, and he hereby is, appointed and made successor in trust to said party of the second part under this deed, with like powers and authority, and the title to said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

And in case of death, absence from the United States, inability or

refusal to act of said party of the second part and of the said Henry R. Bond at any time when action under the foregoing powers and trusts may be required, then Robert P. Johnston, of Springfield, Ills., shall be, and he hereby is, appointed and made successor in trust to said party of the second part and the said Robert P. Johnston under this deed, with like powers and authority, and the title to said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

In testimony whereof the said party of the first part has hereto set her hand and seal, at Springfield, Ills., the day and year first above written.

ROSE H. FOWLER. [SEAL.]

STATE OF ILLINOIS, } ss:
County of Sangamon, City of Springfield, }

I, John A. Hughes, a notary public in and for the county and State aforesaid, and residing in said city, do hereby certify that Rose H. Fowler, personally known to me to be the real person whose name is subscribed to the foregoing instrument as having executed the same, appeared before me this day in person and she acknowledged that she signed, sealed, and delivered the said instrument of writing as her free and voluntary act for the uses and purposes therein set forth, and thereby conveyed all her right, title, and interest in and to the premises described in said instrument and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all acts of the State of Illinois to exempt homesteads from sale on execution, and that she does not wish to retract the same.

Given under my hand and notarial seal this 22nd day of June, A. D. 1874.

[NOTARIAL SEAL.] JOHN A. HUGHES,
Notary Public.

STATE OF ILLINOIS, } ss:
Sangamon County, }

RECORDER'S OFFICE, SANGAMON COUNTY, ILL.,
CITY OF SPRINGFIELD, *June 23rd*, 1874.

I, James A. Winston, clerk of the circuit court within and for the county aforesaid and *ex officio* recorder of deeds, mortgages, and other instruments of writing required by law to be recorded, do hereby certify that the within instrument is duly recorded in my office, in Book No. 37 of Mortgages, page 521.

JAMES A. WINSTON,
Clerk and ex Officio Recorder, Sangamon County, Ill.

(Indorsed:) Filed October 27, 1882. J. A. Jones, clerk.

Whereupon on said twenty-seventh day of October, of the year last aforesaid, a writ of subpœna was issued, and said writ, with the marshal's return thereon, is as follows, to wit:

42 UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

The United States of America to Rose H. Fowler, Sophie Fowler, Henry R. Bond, and Robert P. Johnston, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the southern district of Illinois, at Springfield, in said district, on the first Monday in the month of December next, to answer the bill of complaint of Equitable Trust Company this day filed in the clerk's office of said court, in said city of Springfield, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this 27th day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and 7th year.

[SEAL.]

J. A. JONES, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they shall enter their appearance in the clerk's office of said court, at Springfield aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against them as confessed and a decree entered accordingly.

J. A. JONES, *Clerk.*

42½ [Endorsed:] No. 6456. Circuit court United States, southern district of Illinois. Equitable Trust Company *vs.* Rose H. Fowler *et al.* Chancery subpœna. Returnable to rule day first Monday in December, A. D. 1882. J. A. Jones, clerk. Filed November 2nd, A. D. 1882. J. A. Jones, clerk. Wm. L. Gross, compl't's sol.

I have served the within writ upon the persons therein named in the following manner, to wit:

Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–; also
Upon —— —— on the — day of ——, A. D. 188–,

by personally delivering each of them a copy of the same on the aforesaid days.

I have served this writ on the following-named defendants, not having been able to find them to serve personally, by leaving a true copy thereof for each of them, at their usual places of abode, with persons above the age of ten years and members of their respective famil- and to whom the contents were made known by me, to wit:

Upon Rose H. Fowler on the 1st day of November, A. D. 1882, with Mabel H. Fowler; also

Upon Sophie Fowler on the 1st day of November, A. D. 1882, with Lulu Fowler; also

Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also

Upon —— —— on the — day of ——, A. D. 188–, with —— ——; also

Upon —— —— on the — day of ——, A. D. 188–, with —— ——.

Henry R. Bond & Robert P. Johnston not found in my district.

Marshal's fees:

——— service ..... $———
——— copies ..... $———
——— miles ..... $———
——— ..... $———
$———

JACOB WHEELER,
U. S. Marshal,
By G. A. FOSTER, *Deputy.*

43 Afterwards, to wit, on the fourth day of December, in the year last aforesaid, being at the June term of said court, the following proceedings were had in said court and entered of record, to wit:

Entry of Appearance.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER *et al.*
} In Chancery.

This day comes the defendant, Rose H. Fowler, by N. M. Broadwell, Esq., her solicitor, and enters her appearance herein.

Then, afterwards, to wit, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty-three, the following further proceedings were had in said court and entered of record, to wit:

Leave to Answer.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER *et al.*
} In Chancery.

On motion of defendants, by N. M. Broadwell, Esq., their solicitor, leave is granted them to answer herein by the 20th day of January inst.

44 *Answer of Rose H. Fowler.*

In the United States Circuit Court within and for the Southern District of Illinois. January Term, A. D. 1883.

The answer of Rose H. Fowler, one of the defendants, to the bill of complaint of The Equitable Trust Company, complainant.

This defendant, now and at all times saving and reserving to herself all benefit and advantage of exception which can or may be taken to or had for the many insufficiencies and uncertainties in said bill contained, for answer thereto says—

That, as the complainant in and by said bill makes no exhibits of the alleged bonds and trust deed, this defendant cannot say whether she made and executed the same as alleged and set forth in and by said bill or not. Wherefore she denies all allegations in said bill contained wherewith she is charged with having made and executed the bonds and trust deed referred to in and by said bill.

And this defendant, further answering, says that about the first day of May, A. D. 1874, one R. P. Johnston, having an office and doing business in the city of Springfield, Illinois, for said complainant, proposed, on behalf of said complainant, to lend
45 this defendant the sum of six thousand dollars for five years, at eight per cent. interest per annum, which said proposed loan thfs defendant accepted, and thereupon executed and delivered to said Johnston, as the agent of complainant, her obligations for said sum of six thousand dollars and a trust deed to secure the same; but this defendant does not know, as no exhibits are made in and by said bill, whether the trust deed and bonds in said bill referred to are the same or not, but she supposes they are the same bonds and trust deed so referred to.

And this defendant, further answering, says that if said bonds and trust deed in said complainant's bill mentioned are the same obligations given by her as aforesaid to said Johnston as agent of complainant they and each of them are usurious, in this: that while they, the bonds, in the aggregate, are for the sum of six thousand dollars, as a matter of fact the said Johnston only paid this defendant the sum of five thousand two hundred and fifty-six $\frac{83}{100}$ dollars ($5,256.83) as a loan on said obligations, and that the balance of said sum of six thousand dollars *were* kept, held, and retained by said Johnston under the pretense and claim that the said balance was to be appro-
priated and held by him as his compensation for negotiat-
46 ing said loan, when the fact is that this was a device or contrivance to cover and conceal the usurious character of the said transaction, and so this defendant says that said complainant, by and through its said agent, Johnston, consum-ated said loan to this defendant in the manner aforesaid to evade and avoid the statute of the State of Illinois in regard to usury; and defendant avers that said loan was an- is tainted with usury, and she here

sets up and pleads said statute, and claims and insists upon its protection, benefits, penalties, and forfeitures.

And this defendant, further answering, says that *the* denies each and every allegation in said bill contained, save and except the allegation that complainant is a supposed corporation, assuming to be organized and doing business under the laws of the State of Connecticut, this defendant believes to be true, and she therefore admits the same.

And this defendant, further answering, says that by the laws of said State of Connecticut the said complainant was forbidden to loan money at a greater rate of interest than 7 per cent. per annum,
47 and that in conducting the business as aforesaid with defendant by and through said agent in the State of Illinois the said complainant sought to evade and set at naught the laws of its creation, and thereby to escape from the restrictions and limitations and to avoid the penalties and forfeitures prescribed by said laws; and so defendant says that said complainant had no power under the laws of the State of Connecticut to do and transact the business as aforesaid by and through its said agent.

And this defendant, further answering, says that said complainant did not rerec-ivee in virtue of the laws of its creation a grant of power or authority to carry on the business of loaning money for *him as* at interest in any State or country foreign to or other than the State of Connecticut, and that said complainant, being a foreign corporation without such grant of power, could not exercise the prerogative and privilege of loaning money upon interest in the State of Illinois, and was without capacity to take or receive said bonds and trust deed, and so defendant says that the bonds and trust deed mentioned and referred to in complainant's bill are void and of no effect in law or equity.

48 And this defendant, further answering, says that the said complainant had no authority to do or transact the business of loaning money in the State of Illinois in regard to foreign corporations, and so defendant says that the supposed bonds and trust deed are void and of no effect.

And this defendant, further answering, denies that the complainant is entitled to the relief or any part thereof in said complainant's bill demanded; and defendant prays the same advantage of this her answer as if she had pleaded or demurred to said bill; and defendant prays to be dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

ROSE H. FOWLER,
By her solicitor, N. M. BROADWELL.

(Endorsed:) Filed January 20, 1883. J. A. Jones, clerk.

pany, as the New York law required, certain of said stockholders, for the purpose of making interest on said earnings or profits in fraud of the New York laws, went over into the State of Connecticut
55 and organized the said complainant in the original bill, the Equitable Trust Company, with an office in the city of New York, with the fraudulent intent, by and through the agency of said Equitable Trust Company, to loan said earnings or profits for interest, contrary to the laws of New York; that said contrivance of loaning said earnings or profits by and through said Equitable Trust Company organized as aforesaid was and is but a subterfuge to evade and avoid the laws of New York, and that thereby the said Equitable Life Assurance Company acquired no power to loan said earnings or profits, and the said Equitable Trust Company, its agent as aforesaid, was also without power to do what the said New York company could not do in regard to said earnings or profits.

And your oratrix further represents unto your honors that the said alleged trust deed by Rose H. Fowler to said trustee to secure the loan in the original bill alleged was given by said Rose H. Fowler and received by said Equitable Trust Company to secure a
56 loan of said earnings or profits furnished by said Equitable Life Assurance Company, and said loan and trust deed are in truth and in fact for the benefit of said Equitable Life Assurance Company, which is without power to make such loan or take such security.

And your oratrix further represents unto your honor that said trust deed is void and of no effect in a court of equity, having been concocted and contrived in fraud, as aforesaid, and that the same is an obstruction to and a cloud upon her equitable rights, as aforesaid, as the rightful mortgagee of said real estate.

Your oratrix therefore prays that the said Equitable Trust Company and Rose H. Fowler be made defendants to this cross-bill; that said trust deed be *be* set aside or postponed as against said mortgage debt of your oratrix; that an account be taken under the direction of this honorable court of how much is due your oratrix upon and by reason of said mortgage debt, and that the same so found
57 due may be paid by said defendants or one of them, and in default of such payment that said real estate be sold and the sum so found due your oratrix be first paid out of the proceeds of such sale, and your oratrix prays for such further and other relief in the premises as shall appear equitable and just, &c.

SOPHIE FOWLER,
By her sol., N. M. BROADWELL.

EXHIBIT "A."

This indenture, made and entered into the fourth day of August, in the year of our Lord one thousand eight hundred and eighty-one, between Rose H. Fowler, of the county of Sangamon and State of Illinois, the party of the first part, and Sophie Fowler, of the county of Sangamon and State of Illinois, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of twenty-two hundred dollars in hand paid by the said party of the second part, the receipt of which is hereby ac-
58 knowledged, does hereby grant, bargain, and sell unto *to* the said party of the second part, her heirs and assigns, certain tracts of land situate, lying, and being in the county of Sangamon and State of Illinois known, designated, and described as follows, to wit:

Lots nine (9), ten (10), eleven (11), and twelve (12), in Constant's Second Addition to the city of Springfield, Illinois.

And for the consideration aforesaid the said party of the first part hereby waives and releases, confirms and transfers, and forever relinquish-s to the said party of the second part all right, interest, or title she may now have or may hereafter acquire in and to the real estate hereinbefore described by virtue of the laws of the State of Illinois to exempt homesteads from sale or execution; to have and to hold the aforesaid tracts or parcels of land free from all homestead exemption rights, together with all the appurtenances thereunto belonging or in anywise appertaining, to the only proper use and benefit of her, the said party of the second part, her heirs and assigns forever.

And the said party of the first part, for herself, her heirs, executors, and administrators, does covenant with the said party
59 of the second part that she is lawfully seized; that said land is — from all incumbrance; that she has full right to convey and will forever warrant and defend the said tracts of land from the claim of her, the said party of the first part, her heirs and assigns, and against the claim or claims or any person whomsoever.

Nevertheless the above indenture of mortgage is upon this express and only condition: That whereas the said Rose H. Fowler has executed her certain promissory note, bearing even date with these presents, for the sum of two thousand two hundred dollars, for value received, payable two years after the date thereof to the said Sophie Fowler or order, with interest, at the rate of seven per cent. per annum, from the — thereof until paid: Now, if the said Rose H. Fowler shall well and truly pay or cause to be paid the said promissory note when the same become- due according to the tenor and effect thereof, with the interest that may accrue thereon, then and in that event this indenture of mortgage shall be null and void; otherwise to remain in full force and virtue.

60 In witness whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

ROSE H. FOWLER. [SEAL.]

In the presence of—
JNO. MARVIN.

STATE OF ILLINOIS, } ss.
Sangamon County, }

Before me, the undersigned, a notary public within and for the county aforesaid, came Rose H. Fowler, who is personally known to

me as the real person by whom and in whose name the above conveyance was executed and by whom and in whose name the same is proposed to be acknowledged, and who then acknowledged her signature thereto to be her free and voluntary act and deed for the purpose of waiving all right, title, and interest in and to said land by virtue of the homestead exemption laws of said State and for all the other purposes therein expressed.

Given under my hand and notarial seal this 3d day of September, in the year of our Lord one thousand eight hundred and eighty-one.

L. B. ADAMS,
Notary Public.

[NOTARIAL SEAL.]

61 STATE OF ILLINOIS, } ss:
Sangamon County, }

Recorder's office, Sangamon county, Ills.

CITY OF SPRINGFIELD, *Sept. 3d*, 1881.

I, E. R. Roberts, clerk of the circuit court within and for the county aforesaid and *ex officio* recorder of deeds, mortgages, and other instruments of writing required by law to be recorded, do hereby certify that the within instrument is daly recorded in my office, in Book No. 63 of Mortgages, page 248.

E. R. ROBERTS,
Clerk and ex Officio Recorder, Sangamon County, Ills.

EXHIBIT B.

$2,200.00. SPRINGFIELD, ILLINOIS, *August 4th*, 1881.

Two years after date I promise to pay to Sophie Fowler or order the sum of two thousand two hundred dollars, for value received, with interest, at the rate of seven per cent. per annum, from the date hereof until paid.

ROSE H. FOWLER.

(Indorsed:) Filed January 20, 1883, J. A. Jones, clerk.

62 *Entry of Appearance.*

UNITED STATES OF AMERICA, }
Southern District of Illinois. }

In the Circuit Court Thereof, of the June Term, A. D. 1882.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER, SOPHIE FOWLER, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

Henry R. Bond and Robert P. Johnston, defendants in the above-entitled cause, in proper person, come and severally waive the issue

and service of process herein and severally enter their appearance herein.

HENRY R. BOND.
ROBERT P. JOHNSTON.

(Endorsed:) Filed January 20, 1883. J. A. Jones, clerk.

63 *Refusal of Bond to Act as Trustee.*

NEW LONDON, *October* 16, 1882.

To Equitable Trust Company:

I, Henry R. Bond, hereby refuse and decline to act as trustee under a certain trust deed, dated May 1st, 1874, made by Rose H. Fowler to Jonathan Edwards, as trustee, recorded in the records of Sangamon county, Illinois, in Book of Mortgages 37, at page 521.

Respectfully, HENRY R. BOND.

Refusal of Johnston to Act as Trustee.

ST. LOUIS, MO., *Nov.* 10, 1882.

To Equitable Trust Co.:

I, Robert P. Johnston, hereby refuse and decline to act as trustee under the certain trust deed above herein described and referred to.

ROBERT P. JOHNSTON.

(Endorsed:) Filed January 20, 1883. J. A. Jones, clerk.

64 In the U. S. Circuit Court of Southern District of Illinois. January Term, A. D. 1883.

EQUITABLE TRUST CO. *vs.* ROSE H. FOWLER *et al.* } In Chancery.

The replication of Equitable Trust Company, the complainant, to the separate answers of Rose H. Fowler and of Sophie Fowler.

This repliant, saving and reserving to itself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answers of the said defendants, for replication thereto says that it will aver, maintain, and prove its bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honor-

able court shall direct, and humbly prays as in and by its said bill it has already prayed.

W. L. GROSS,
Solicitor for Complainant.

(Endorsed:) Filed this seventh day of March, A. D. 1883. J. A. Jones, clerk.

65 *Answer of Equitable Trust Co. to X Bill.*

In the Circuit Court of the United States within and for the Southern District of Illinois.

To the honorable judges of said court, in chancery sitting:

The answer of the defendant, The Equitable Trust Company of New London, Connecticut, to the cross-bill of complaint of Sophie Fowler.

This defendant, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said cross-bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for it to make answer to, saith:

It admits that on or about the 27th day of October, 1882, this defendant, being a foreign corporation, exhibited in this honorable court its bill of complaint against Sophie Fowler, Rose H. Fowler, Henry R. Bond, and Robert P. Johnston to foreclose a trust deed therein described, but, as to the contents of said bill of complaint, it prays to refer to the same when produced.

66 It has no knowledge or information sufficient to form a belief as to whether the said Rose H. Fowler, being the owner and in possession of the real estate in said bill of complaint described, did, on the 4th day of August, A. D. 1881, convey the same by mortgage deed to said Sophie Fowler to secure the payment of twenty-two hundred dollars, to be paid according to the tenor and effect of a promissory note of even date with said mortgage deed made, executed, and delivered by said Rose H. Fowler to said Sophie Fowler, drawing interest at the rate of seven per cent. per annum, except that this defendant is informed and believes that a mortgage substantially similar to Exhibit A, attached to the said cross-bill, appears of record, but this defendant has no knowledge or information sufficient to form a belief as to whether said mortgage was made for valuable consideration and in good faith, and charges that there was no valid consideration therefor and that said mortgage was not made in good faith; and this defendant prays to refer to said mortgage, if produced, for the terms thereof.

It admits, upon information and belief, that some years ago certain persons duly organized a corporation under the laws of the State of New York for the purpose of doing a life assurance

67 business, which corporation was called The Equitable Life Assurance Society of the United States and had its chief

office in the city of New York; that it engaged in said business of life assurance and so successfully conducted the same that in course of time a large sum of money was accumulated as the earnings or profits of said business.

It denies each and every allegation contained in the fourth paragraph of the said cross-bill which begins with the words "and your oratrix further represents unto your honors that said Equitable Life Assurance Company had no power," &c., and ends with the words "in regard to said earnings or profits."

It denies each and every allegation contained in the fifth paragraph of said cross-bill which begins with the words "and your oratrix further represents unto your honors that said alleged trust deed" down to the words "which is without power to make such loan or take such security," at the end of said paragraph. It denies each and every allegation contained in the sixth and last paragraph of said cross-bill, immediately preceding the prayer thereof.

And for further answer this defendant reaffirms and realleges each and every of the allegations contained in its bill of complaint
68 aforesaid, except that it admits that the sum of eleven hundred and nineteen and $\frac{35}{100}$ dollars has been paid on account of interest on the bonds and mortgage mentioned in said bill of complaint since the maturity thereof.

And this defendant, further answering, says that it is a corporation organized and existing under the laws of the State of Connecticut and having power by its *charts* to loan money, and that the trust deed mentioned in its said bill of complaint was given for a loan of money authorized by its charter and made by it from its own funds, and that the said Equitable Life Assurance Society of the United States was not at the time said loan was made nor has it been at any time since in any manner interested therein or in said trust deed or the obligations secured thereby.

This defendant submits to this honorable court that the said Sophie Fowler by her cross-bill has not shown any case in equity or any matters entitling her to any relief in this honorable court, and prays all such benefit as if it had demurred to the said cross bill.

And this defendant denies all and all manner of unlawful
69 combination and confederacy wherewith it is charged by said cross-bill; without this, that there is any other matter, cause, or thing in the said complainant's said cross-bill contained material or necessary for this defendant to make answer to and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is not true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with *his* reasonable costs and charges in this behalf most wrongfully sustained.

[SEAL.] EQUITABLE TRUST COMPANY,
By F. B. ELLIOTT, *President.*

Attest: EDWIN S. MARSTON, *Ass't Sec'y.*

W. L. GROSS,
Sol'r for Def't in Cross-Bill.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City, County, and State of New York, }

Edwin S. Marston, being duly sworn, says that he is the
70 treasurer and assistant secretary of The Equitable Trust Company of New London, Connecticut, the defendant named in the foregoing answer; that said defendant is a corporation; that he has read the foregoing answer, and that the several matters therein set forth are true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

EDWIN S. MARSTON.

Sworn to before me this 2nd day of March, 1883.

[NOTARIAL SEAL.] PATRICK HOGAN,
Notary Public.

(Indorsed:) Filed March 7, 1883. J. A. Jones, clerk.

Then, afterwards, to wit, on the twelfth day of March, in the January term of said court and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

71 *Default as to Bond & Johnston.*

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER, SOPHIE FOWLER, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

This day comes the complainant, by William L. Gross, Esq., its solicitor, and the said defendants, Henry R. Bond and Robert P. Johnston, having entered their appearance herein and having failed to file their answer in accordance with the rules and practice of this court, it is therefore ordered and adjudged that the default of said defendants, Henry R. Bond and Robert P. Johnston, be, and the same is hereby, accordingly entered of record and the complainant's bill of complaint be taken *pro confesso* against said defendants.

Whereupon, on motion of complainant, this cause is referred to the master in chancery of this court to take testimony and compute the amount due said complainant and make report thereof to this court.

72 In the Circuit Court of the United States for the Southern District of Illinois.

EQUITABLE TRUST COMPANY
v.
ROSE H. FOWLER *et al.*
} In Chancery.

The report of John A. Jones, master in chancery of said court, to whom said cause was referred for computation and report.

Said master, to the hon. judges of said court, reports as follows:

That complainant produced before him six real-estate mortgage bonds, dated May 1st, 1874, and due May 1st, 1879, ea. $1,000.00 ..... 6,000 00

Int., 10%, after due to April 2, '83	3 years,	1,800	
	11 mos.,	550	
	1 day,	1 66	
			2,351 66
Insurance advanced by compl't		20 37	
Int. on ins. advanced July 26, '82, 8 mos. & 6 days		1 38	
			21 75
			$8,373 41

Credits admitted by compl't:

July 1, 1881	927 35	
January 30, 1882	192 60	
		1,119 35
Total amount due		$7,254 06
Solicitors' fees as prayed for, being same as sheriffs' fees of circuit courts of Illinois		111 81
Total am't due		$7,365 87

Dated Springfield, Ills., April 2, '83.

All which is respectfully submitted to the court.

J. A. JONES,
M. C., U. S. C. C., S. D. Ill.

(Indorsed:) Filed April 2, 1883. J. A. Jones, clerk.

73 Afterwards, to wit, on the thirtieth day of April of the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Rule on Defendants to Close Testimony.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER *et al.* } In Chancery.

On motion of complainant, by W. L. Gross, Esq., its solicitor, the defendants are ruled to close their testimony herein filed by the first Monday of June next.

Then, afterwards, to wit, on the first day of June, in the term and year last aforesaid, the following further proceedings were had in said court and entered of record, to wit:

Leave to Amend Answer.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER *et al.* } In Chancery.

On motion of defendants, by N. M. Broadwell, their solicitor, leave is granted to amend their answer herein.

74 Then, afterwards, to wit, on the first day of June of the year last aforesaid, came again the defendant Rose H. Fowler and filed in the clerk's office of said court her amended answer in the words and figures following, to wit:

Amended Answer.

EQUITABLE TRUST CO.
v.
ROSE H. FOWLER *et al.* } In Chancery.

And the said defendant, Rose H. Fowler, comes, by leave of court, and amends her answer as follows, to be inserted at the end of paragraph one, 4th page, concluding with word "forfeitures," to wit:

And this defendant, further answering, says that before and at the date of said bonds the said complainant was carrying on the business of lending money in the said city of Springfield through and by the agency of said Johnston, and that this defendant applied to said agency for a loan of $6,000 for five years at 10 per cent. interest per annum, which application was duly accepted, and this defendant was informed that said loan on the said terms would be made to her.

75 And this defendant avers that when she came to make and execute the bonds and trust deed to secure said loan it was corruptly agreed by and between her and said complainant that the bonds to evidence said loan should be for $6,000 at 7 per cent. interest per annum; that the difference between 7 per cent. and 10 per cent. interest per annum should be deducted from the amount

of said loan, $6,000, in advance for the whole period of 5 years, and that this defendant should pay $150 to said Johnston as his commission in the premises; and accordingly, being in great distress for money, this defendant closed said business by giving her said bonds for $6,000 at 7 per cent. interest, and received only so much of said $6,000 as was left after deducting therefrom said difference between 10 and 7 per cent. per annum for five years since by paying said sum of $150 to said Johnston, and this was and is the whole and only consideration ever received for said bonds and trust deed.

And this defendant avers that said complainant well knew that said Johnston so corruptly conducted and closed said loan to this defendant.

N. M. BROADWELL,
Sol. for Def't.

76 And this defendant, for further amendment, by leave of the court, for paragraph following the above, says that said contract for the loan of said money was and is a contract of the State of New York, and that under the laws of that State the said contract is usurious, the same being for a greater rate of interest than seven per cent. per annum.

And defendant here pleads and sets up the statutes of New York against usury and claims the benefit thereof.

N. M. BROADWELL,
Sol. for Def.

(Endorsed:) Filed June 1, 1883. J. A. Jones, clerk.

77 Then, afterwards, to wit, on the fifteenth day of October, in the June term of said court and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Appointing H. W. Taft Special Com'r.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER *et al.*
} In Chancery.

It is ordered by the court that Henry W. Taft, of the city of New York, be, and he is hereby, appointed special commissioner in the above-named cause to take the evidence of such witnesses as may be produced before him, the same to be taken orally, at his office, No. 18 Exchange Place, in said city of New York, by the parties herein, in conformity with the rules of equity, and report the same to this court without unnecessary delay.

That reasonable *time* of the time of taking such evidence shall first be given the respective parties or their solicitors.

78 *Deposition of Robert P. Johnston.*

In the Circuit Court of the United States for the Southern District of Illinois.

EQUITABLE TRUST COMPANY
v.
ROSE H. FOWLER *et al.* } In Chancery.

Testimony of Robert P. Johnston, witness on behalf of defendant, taken September 27th, 1883, before the master in chancery of said court, at his office, in the city of Springfield, in said district.

ROBERT P. JOHNSTON, being first duly sworn, deposes and says: My name is Robert P. Johnston; reside at present in the city of St. Louis; prior of February, 1882, I resided in the city of Springfield, Illinois. I am personally acquainted with the defendant Rose H. Fowler, Dr. Edwin S. Fowler, and his wife, Mrs. Sophie Fowler. About June, 1874, I was engaged in business in Springfield, in the real estate and loan business. About June 6th, 1874, the defendant Rose H. Fowler executed a written application to the complainant in this case for a loan of six thousand dollars upon real-estate security, which application is here presented, marked "Exhibit A."

79 After its execution and delivery to me by the defendant I sent it to the office of the Equitable Trust Company, in N. Y., by due course of mail. The application was accepted and the loan granted for the full six thousand dollars for five years. The trust deeds and bonds in this case were executed and delivered to me prior to the 22nd day of June, 1874, and the trust deed had been sent to the complainant in New York and had been returned to me as correct for execution. The trust deed and bonds were executed and delivered to me about the 22nd day of June, 1874, as complete. This was a loan of six thousand dollars at ten per cent. Seven per cent. of the interest was evidenced by the interest coupons attached to the six one-thousand-dollar bonds, and the remaining three per cent. was discounted for the five years and deducted from the $6,000.00. The trust deeds and bonds in this case bear date the 1st day of May, 1874, and the interest which accrued on them from May 1st, 1874, to June 23, 1874, was paid to the defendant.

Par value of bonds was	$6,000 00
Discount, 3 %, 5 years was	694 80
Leaving the sum of	$5,305 20
To this was added accrued interest	76 63
Making the total	$5,381 83

This is more explicitly shown by a statement prepared by me at the time, which is hereto attached, marked "Exhibit B."

80 The present value of this loan, as shown by the foregoing statement, and which is correct, was $5,381.83, for which sum

I executed and delivered to the defendant on June 23, 1874, my sight draft on the complainant, payable to the order of the defendant, and which draft is here attached and marked "Exhibit C."

This draft the defendant received, negotiated, and received in full from the complainant. I recognize on the back of the draft the signature of the defendant and of her father, John Marvin. I had an agreement with the defendant that upon the completion of this loan she was to pay me a commission of one hundred & fifty dollars. On the same day, or within a short time afterwards, she paid me accordingly. The draft for $5,381.83 exhibited was for the full value of this loan on the day it was negotiated, and no deduction therefrom was made by me on account of my said commission or on any other account whatever. The agreement between myself and the defendant was unknown to the complainant, and no part of my said commission went to or was paid to the complainant. The expense of the abstract of title furnished by the defendant and the acknowledgment and recording of the trust deed was, of
81 course, paid by the defendant by agreement. Shortly before this loan matured, namely, May 1st, 1879, the complainant insisted the loan must either be paid or renewed by the execution of new bonds and trust deed upon the same property, renewing said loan for the further period of five years at 8 per cent. per annum, payable semi-annually. At the request of the defendant I prepared new bonds, ready for her signature, and so notified her. I understood from Mr. Marvin, who was acting for his daughter, the defendant, and with whom most of this business was transacted, that Dr. E. S. Fowler was in New York negotiating for money with which to pay off this mortgage, and that pending such negotiation the defendant would delay executing those papers from day to day and from time to time. The new papers were not executed. No interest accruing on this loan after maturity was paid to me. I should add that the condition upon which this loan was to be renewed, as before stated at eight per cent. interest, was that all accrued interest was to be paid up; they were behind with the interest at that time. In the negotiation of this loan, from its inception to its completion, I acted as the medium of communication between the complainant and the defendant. I was not authorized,
82 nor did I attempt, to accept or reject the defendant's application for this loan, excepting so far as to recommend its acceptance by the complainant, nor did I pass on the question of title to the real estate, the whole matter having been submitted to and decided by the complainant in New York, nor for what I did in connection with this loan was I paid by the complainant anything, nor was I authorized to do anything by the complainant in connection with this loan more than I did and as here shown.

Cross-examination:

I had an understanding with the complainant company a short time before this loan was made. This loan and all other loans I made were in pursuance of this understanding. The complainant furnished me with the blank "Exhibit A" in this case and blank "Exhibit

B" and gave instructions as to how they should be filled up, which I accordingly followed in filling up such blanks. When I procured an application in this way I forwarded same to the company for their consideration, acceptance, or rejection. In my indorsement on this application recommending the loan, in signing
83 my name as agent, I understood myself as agent of the company in this matter. Complainant acted through me in making this loan. In my arrangement with complainant for making these loans it was the understanding that complainant was to pay me nothing whatever for my services, and that I was to procure whatever pay I had from the borrower.

EXHIBIT A.

Application to the Equitable Trust Company of New London, Conn. New York office, 76 Cedar street.

The undersigned applies for a loan secured by deed of trust to Jonathan Edwards, trustee, as follows:

Amount of loan: $6,000, for three years.

Annual rate of interest, payable semi-annually: Ten per cent. per an.

Full name of obligor: Rose H. Fowler.

Occupation and present place of business: Widow of Wm. M. Fowler.

Full name of wife, if married: —— ——.

Description of property offered as security by lot and block or by metre & bounds: Lots 9, 10, 11, & 12, Constant's 2d Addition to Springfield, Ills.

Location: Corner Wright & 2d streets, city of Springfield, Illinois.

Dimensions of ground: 160 feet on 2d by 320 on Wright.

84 It will be necessary to give two references in the following blanks as to the pecuniary responsibility of the obligor.

Name: E. L. MENITT, *Editor*,
Address: *Springfield, Ills.*

Name: S. H. TREAT,
Judge U. S. Court,
Address: *Springfield, Ills.*

Dimensions of building: 44 by 35 ft.; 2-story and attic.

Building materials: Frame.

Purposes of use: Dwelling of applicant.

Value of ground, $8,000 } Total, $18,000.00.
Value of building, 10,000 }

Insurance: $6,000.

Loan to be used to purchase land.

Annual rent: $900.00.

What mortgages now on premises, and by whom held? None.

Is title a fee simple, unincumbered, except as in last answer? Yes.

Is the street in front paved? No. Flagged? No. Sewered? Yes. Has it gas pipes? Yes. Water pipes? Yes.

N.

Nos 322 & 323.
Fowler
et.
Trust Co.

Constants 2d Addition to Springfield

Main Street

Second Street

W

E

S3⅓ S3⅓ S3⅓ 172½

9 10 11 12 182

S.

Exhibit B"

Fire insurance policies and renewals to be effected by and premiums paid through a person named by the company to supervise the same.

N. B.—The applicant will please specify the above particulars so far as practicable and in all cases sign the application.

ROSE H. FOWLER.

Dated Springfield, Ills., June 6, 1874.

SPRINGFIELD, ILLS., *June* 6, 1874.

I have examined the within application, believe the statements to be correct, and recommend a loan to applicant of $6,000 on the security offered.

R. P. JOHNSTON, *Agent.*

(Here follows diagram marked p. 85.)

85 "EXHIBIT B."

AGENCY OF EQUITABLE TRUST COMPANY,
SPRINGFIELD, ILLS., *June* 22, 1874.

Jonathan Edwards, Esq., pres't, 76 Cedar St., New York.

DEAR SIR: We have this day forwarded to you by Am. Ex. Co. 6 bonds of Rose H. Fowler, Nos. 3058 to 3063, inclusive, series, and to-morrow shall draw on you in favor of Rose H. Fowler as per following account:

86

Par value of bonds	6,000 00	
Less discount from May 1, 1874, to May 1, 1879	694 80	
		5,305 20
Interest from May 1, '74, to June 23, '74, 1 mo. 22 days		76 63
		$5,381 83

On this security we have insurance properly assigned to you as follows:

Company.	Expiration.	Amount.
N. British & Mercantile	Febr'y 4, 1875	3,100
Underwriters' (Germania and Hanover)	" " "	3,100
		$6,200 00

The approval of Richmond Wolcott, att'y, of the title of this security will be forwarded with the policies to-morrow.

Yours respectfully, R. P. JOHNSTON, *Agent.*

"EXHIBIT C."

$5,381.83. SPRINGFIELD, ILLS., *June* 23, 1874.

At sight pay to the order of Rose H. Fowler fifty-three hundred

& eighty-one & $\frac{83}{100}$ dollars, value received, and charge the same to account of—

R. P. JOHNSTON.

To Equitable Trust Co., 52 William St., N. York city.

87 (Endorsed:) Rose H. Fowler. John Marvin. Pay to the order of H. H. Nazro, cash'r, for collection account First National Bank, Springfield, Ill. F. W. Tracy. W., cr.

(Ninth National Bank, New York. Paid.)

88 *Deposition of John Marvin.*

In the Circuit Court of the United States for the Southern District of Illinois.

EQUITABLE TRUST COMPANY *vs.* ROSE H. FOWLER *et al.* } In Chancery.

Testimony of witnesses on behalf of defendants, taken before J. A. Jones, master in chancery of said court, at his office, in the city of Springfield, on Thursday, May 31, 1883.

JOHN MARVIN, being first duly sworn, deposes and says: My name is John Marvin; age, 85 years; residence, Springfield, where I have resided since 1862. The defendant, Rose H. Fowler, is my daughter. I attended to negotiating a loan with the complainant for the defendant Rose H. Fowler some time about the 1st of June, 1874. I carried on the negotiation in this city with R. P. Johnston, the agent of the Equitable Trust Company. I think an application for the loan was made in writing. The amount applied for was six thousand dollars for five years and at ten per cent. per annum. Mrs. Fowler's house and lots, the same described in the bill, was the security to be given. I submitted the application to Mr. Johnston in this city, and he said he sent it on to the company for their acceptance or rejection. In a few days Mr. Johnston said the company had accepted the loan. On the 22nd of June, 1874, the papers were executed in order to obtain the loan for which the property had been made. I attended to receiving the money for Mrs. Fow-
89 ler. It was paid over June 22nd, 1874. I received on that loan for Mrs. Fowler $5,231.83; that is all that was received and no more.

Cross-examination:

X Int. 1. How did you happen to go to Mr. Johnston to negotiate this loan for your daughter?

Ans. I heard he was agent for the Equitable Trust Company of New York and was loaning money in Springfield, and being in want of money I applied to the company through him.

X Int. 2. If an application in writing was made for this loan, to whom was it addressed and by whom made and signed?

Ans. The application was made to the Equitable Trust Company. It was made by Rose H. Fowler and signed by her.

X Int. 3. You have said that this application was for a loan of $6,000.00 for five years at 10 per cent., and you have said that the bonds were executed about the 22nd of June for this loan. *Satae* what rate of interest such bonds bore.

Ans. Seven per cent.

X Int. 4. In what manner was the remaining three per cent. secured or evidenced?

Ans. There was nothing more done than that; it was just left that way. I paid seven per cent. instead of ten. I got that benefit, which is all I see.

X Int. 5. With whom did you make the arrangement by which this loan was to be made at seven per cent. instead of ten?

Ans. With R. P. Johnston, agent of the company.

(Witness is here shown the 6 $1,000 bonds heretofore produced by the complainant and filed herein, and is asked:)

X Int. 7. Are these the bonds referred to by you in your examination-in-chief as having been made by the defendant Rose
90 H. Fowler as evidence of the loan you have spoken of?

Ans. I think they are.

X Int. 8. What other evidences of indebtedness, if any, did the defendant Rose H. Fowler execute at the same time in evidence of the principal or interest upon this loan of $6,000.00?

Ans. Coupon bonds for the interest.

X Int. 9. Are these bonds which have been shown you the coupon bonds to which you refer?

Ans. They are the bonds to which the coupon bonds for interest are attached.

X Int. 10. Were these bonds which have been shown you and the interest coupons thereto attached the only obligations made by defendant for this loan?

Ans. It is all I know of.

X Int. 11. How was this sum, $5,231.83, paid?

Ans. It was paid, I think, by draft. I am not sure whether I got the Equitable Trust Company's draft or Mr. Johnston's draft—one or the other.

X Int. 12. How came you to accept $5,231.83 for the 6 $1,000 bonds executed by the defendant?

Ans. Because the interest was reduced from ten to seven per cent., which, they said, would make it equal to a loan of ten per cent. I find it did not make it equal; there is a little difference.

X Int. 13. Please state how reducing the rate of interest from ten to seven per cent. per annum for five years could thus effect the amount of the principal.

Ans. I get the benefit of seven per cent. instead of ten per cent. That makes the difference.

(Further taking of testimony is adjourned this 31st day of May, 1883, to to-morrow morning, ten o'clock a. m.)

91 X Int. 18. Do you mean that the difference between $6,000, amount of loan, and $5,231.83, amount you received in draft, would be the discount?

Ans. That is what I call the three per cent. discount.

X Int. 19. Please state what would be the discount of $6,000 at 3 per cent. per annum for 5 years.

Ans. Just reckon the interest. It would be an easy matter to see what interest would be for five years.

X Int. 20. Please reckon it and state the amount.

Ans. Nine hundred dollars.

X Int. 21. If the discount was $900 and you received $5,231.83, please state and point out how it is that the discount is too much by nine hundred dollars. You say you never got it.

Ans. Part of it was in commissions. The interest for five years at three per cent. on $6,000 is $900, but that does not follow that I ought to receive but $5,100.00.

X Int. 22. How much ought you to have received?

Ans. As I have said before, I ought to have received about three hundred dollars more than I did.

X Int. 23. Please explain why you should have received $300 more.

Ans. Because reducing at three per cent. and the commission didn't amount to that, the way I calculate.

X Int. 24. How should it be calculated to be correct?

Ans. You have the figures of the amount of money I got, and make your own calculation. I haven't got time to do it now. Different ones have different ways of calculating it. There are
92 different ways of doing it; there are two or three ways it might — done, and to tell them would take some little time.

(Counsel for complainant requests witness to take what time is necessary.)

I think I can answer it in time.

Witness produces a calculation which he thinks is a correct statement and is hereto annexed, marked Exhibit A.

X Int. 25. In this calculation have you assumed that the company withheld the interest on $6,000.00 for one month and 22 days?

Ans. The loan was made June 22 and the papers were dated May 1. At the time the draft was drawn the interest on $6,000.00 for one month and 22 days was included and made a part of the draft.

X Int. 26. What part of the draft was for the interest for one month and 22 days, as figured by you in Exhibit A?

Ans. Sixty dollars and sixty-six cents.

X Int. 27. You received by draft $5,231.83, and you say that $60.66 of this sum was accrued interest for one month and 22 days. Is that correct?

Ans. Yes, sir.

X Int. 28. Will you state from the calculation you have made and exhibited what sum should rightfully have been deducted from the

$6,000.00 for the discount on that sum, at three per cent. per annum, for five years?

Ans. I did not figure it that way. I ought to have got about $200 more than I received, else there would have been no balance there. The exact amount of the deficit, as I figure it, is two hundred and nineteen dollars and forty-eight cents ($219.48.)

X Int. 29. The amount of the loan was $6,000.00, as you say. The sum you received was, you say, $5,231.83 less $60.66.
93 Now, what of the sum deducted from the loan was for agent's commissions, if any?

Ans. I paid one hundred and fifty dollars. That was the amount charged. I didn't want to pay it, but couldn't get the money without.

X Int. 30. To whom did you pay the $150.00?

Ans. R. P. Johnston, of this city.

X Int. 30½. Was the $150.00 you paid, being a part of the Equitable Trust Company, by the draft you have spoken of?

Ans. The discount and commission was all put together and taken out before the draft was drawn.

X Int. 31. In whose favor was the draft drawn?

Ans. In Rose H. Fowler's. I am not certain.

X Int. 32. Who drew the money on it?

Ans. I guess I drew the money on it after it was indorsed; I think so.

Redirect examination:

Mrs. Fowler made an application for a $6,000.00 loan for 5 years at ten per cent. Mr. Johnson after a few days informed me on behalf of the company that the application for the loan would be accepted. I closed up the matter 22nd day of June, 1874, by giving the bonds heretofore referred to and the trust deed. The bonds were antedated to May 1st, although made the 22nd day of June. When we applied for the loan we expected to get it at ten per cent.
When the bonds came Mr. Johnston said the company pre-
94 ferred to take a seven per cent. bond and deduct the difference between that and ten per cent., and in that way he claimed to make it equal to ten per cent., and the amount less six thousand dollars was to cover the item of three per cent. for five years. The $150.00 paid for commissions was in addition to the three per cent.

Deposition of E. S. Fowler.

E. S. Fowler, being first duly sworn, deposes and says: My name is Edwin S. Fowler; reside in the city of Springfield; have been acquainted with the defendant Rose H. Fowler thirty years. She is my widowed sister-in-law. About the time the loan was due and before I attended to her business with the complainant, which I did under her authority, I attended to the matter of reducing the interest to eight per cent. on these bonds, which was to take effect on maturity of the bonds. About the time or a little before the loan

became due I made this arrangement with the company. The understanding was the loan was to run longer at eight per cent. No time was specified for which the loan was to run. I had some conversation with respect to Mr. Johnston's agency. Mr. Rockwell came to me, whom I knew, and asked me if I knew a good person for his agency. I suggested Mr. Johnston and took him over to the state-house and introduced him. That was some time before the loan was made. Mr. Rockwell was an officer of the company. The business of the agent here, Mr. Rockwell said, was to loan money. I had a conversation with Mr. F. B. Elliott, now the president of the company, with respect to this loan, then a vice-president. I
95 think he told me Mr. Johnson got no salary from the company; that his compensation was commissions from the borrower entirely. He told me Mr. Johnson was his agent here to loan money. This conversation was with respect to this loan, as well as to others. I can't tell just when this particular conversation was. I have had a good many conversations with him. It was, perhaps, in 1879 or 1880 Mr. Johnson told me the same thing with respect to his compensation. The company paid him nothing. He got his pay from the borrower.

Cross-examination:

X Int. 1. When, where, and with whom did you make the arrangement you have spoken of reducing the rate of interest on this loan?

Ans. It was about the time of the maturity of the loan, or a little before, at the office of the company, in New York, and with Mr. F. B. Elliott. He was vice-president or president, I think.

X Int. 2. Was this arrangement you speak of at that time reduced to writing?

Ans. I don't know that it was at that time. I have his letters since that time, as well as his accounts showing it.

X Int. 3. I will ask you to state in detail and specifically the terms and conditions of the arrangement you made at the time you have spoken of in the office of Mr. Elliott, in New York.

Ans. I went to Mr. Elliott at that time with a view of getting the interest reduced, because the interest was generally lower. My object was either to have it reduced or to pay it off, and I so stated to
96 him. I tried to get it reduced to 6 or 7 per cent. Mr. Elliott suggested that interest would be higher and suggested that, in view of letting the loan run, he would reduce it to eight per cent., to which I assented. I know of no other terms.

X Int. 4. Have you stated all that passed between you and Mr. Elliott at that time with respect to reducing the rate of interest on this loan?

Ans. I remember nothing else than I have stated.

X Int. 5. What was the consideration for this reduction of interest?

Ans. That the loan was to remain; it was a high rate of interest.

X Int. 6. How long was the loan to run under that arrangement?

Ans. I don't think there was any time specified.

X Int. 7. Was it to run one year?

Ans. I don't believe there was any time specified.

X Int. 8. If the company reduced the rate of interest to eight per cent. and let the loan run what did you on behalf of Rose H. Fowler undertake to do?

Ans. I don't think there was anything additional, except she was to pay eight per cent. interest.

X Int. 9. When was she to pay the eight per cent. interest?

Ans. I don't think there was any time specified.

X Int. 10. State, if you know, when, after the time you made this arrangement, she paid interest on the loan at 8 per cent.

Ans. I don't remember. I have the bills that will show.

X Int. 11. If you have anything that will show a payment by the defendant of interest upon this loan accruing after maturity at the rate rate of 8 per cent. please produce it.

Ans. I here produce a statement of account dated July 1st,
97 1881, received by me in due course of mail, marked "Exhibit A" and hereto attached, and a receipt of the same date, marked "Exhibit B," and also receipt dated January 30, 1882, marked "Exhibit C," and also statement of account dated August 14th, 1882, marked Exhibit D.

X Int. 12. State, if you know, what part of the receipt, Exhibit C, was for the interest upon this loan.

Ans. They have apportioned it themselves, as shown by Exhibit D; one hundred and ninety-two dollars ($192.00).

X Int. 13. What other payments, if any, have been made since maturity?

Ans. None, that I know of, subsequent to these.

X Int. 14. Did you, at the time you made the arrangement of which you have spoken (with Mr. Elliott), make application to have that arrangement indorsed upon the bonds and trust deed in any way?

Ans. I think there was something said about it, and that the bonds were out of their possession and — could not be done. I think the bonds were in Europe.

X Int. 15. What were the special circumstances, if any, under which statement "Exhibit D" was furnished?

Ans. I don't know any special circumstances.

X Int. 16. Is it not true that prior to the rendering of that statement the company were threatening to foreclose this trust deed?

Ans. I think I did get some letter in reference to that. I think he wanted me to pay part of the principal off and reduce the loan.

X Int. 17. Is it not true that prior to the rendering of Exhibit "D" the trust deed had been placed in the hands of the com-
98 pany's attorney in this city for foreclosure, and that the defendant had been notified by said attorney if the debt was not paid the same would be foreclosed?

Ans. It may or may not be true; I don't know.

X Int. 18. After the trust deed had been placed in the hands of

said attorney for foreclosure did you have a correspondence with any of the company's officers in respect thereto?

Ans. I think I wrote them about that time; it may have been before or it may have been after.

X Int. 19. If you wrote them after the time referred to, have you a copy of said letter?

Ans. I don't know. I have some copies of letters in my letter book; don't know whether this is among them or not.

X Int. 20. You have said that when you went to the company's office and made the arrangement for reducing the rate of interest in this case you did so for the purpose of paying off the loan or getting the interest reduced. What estate, if any, of the defendant did you have in your hands or under your charge?

Ans. I hadn't any.

X Int. 21. In the conversation you had with Mr. Rockwell before this loan was made in regard to Johnston's agency what did he tell you Johnston was authorized to do?

Ans. I don't remember that he even told me anything.

X Int. 22. Is it not true that the consideration upon which the company agreed, if it did agree, to reduce the interest on this loan after maturity to 8 per cent. was that the interest should be paid promptly semi-annually, as stated in the trust deed, and
99 that the principal should be paid by a time certain?

Ans. I don't remember any such agreement; there was no such agreement. The consideration was the loan would be allowed to run at eight per cent. I think he told me their object was to keep their money out.

X Int. 20. Had all the interest coupons attached to the bonds in this case been paid and taken up by the mortgagor prior to the interest payment made July 1st, 1881?

Ans. Mr. Marvin paid the interest at first and I kept no run of it. When he ceased to pay I paid the interest for them and I paid all the interest they claimed of me was due. I think I took all the coupons I paid, or else had their receipts. When the interest was not paid when due I paid interest on interest at 10 per cent. I did this a number of times.

X Int. 21. Did the trust deed and interest coupons provide for interest after due?

Ans. I believe the coupons did.

Re-examination:

I do not know what interest she had paid at the time when I began paying. I know all the interest was paid up at the time I began paying. I know this from statements made by the company to me and from my own checks. I think it was in 1878 I paid the first interest for her. I have an account here of interest paid in 1879. Interest in 1879 was paid September 30th—$448.00, of which $28.00 was compounded at ten per cent. They rendered a bill to me July 1st, 1881, in which they charged $240; November 1st, 1879,
100 $40.00 compound interest at ten per cent.; May 1st, 1880, $240.00, $28.00 compound interest at ten per cent.; Novem-

ber 1st, 1880, $240.00, $16.00 compound interest at ten per cent.; May 1*ts*, 1881, $240.00, $4.00 compound interest at ten per cent. I paid the above items for Mrs. Fowler January 30, 1882. I paid them $800.00 on all three of the loans and took their receipt for it. I didn't direct any particular amount to be credited on her loan, but they apportioned it—I mean of the $800.00 payment. According to my calculation, the $800.00 paid all the interest due up to January 30, 1882, on the three notes.

Recross-examination:

X Int. 1. Up to what date had the defendant Rose H. Fowler paid the interest before you began paying? Fix the date.

Ans. I think I paid one year's interest in 1878; that was the first I paid.

X Int. 2. State the several payments made by you on the interest on this loan, giving dates and amount of each payment.

Ans. First I paid was in 1878, one year's interest; September 30, 1879, I paid on hers $440.00; July 1st, 1881, I paid $1,048; January 30, 1882, I paid $192.00.

X Int. 3. Have you or has the defendant or any one for her, so far as you know, made any other or further payment of the principal or interest of this loan?

Ans. I think I have mentioned all that was paid.

X Int. 4. Have you any receipt or acknowledgement of the complainant showing that on July 1st, 1881, you paid on account of interest on this loan, $1,048.00, you claim to have then paid? If so, please produce it.

101 Ans. I have exhibited their receipt for $3,863.95, and their apportionment for that on Exhibit D was $927.35 on this loan. This discrepancy partly arose from an account they have sent me in which they charge on the $10,000 loan interest at eight per cent. and carry it out at nine for several instalments.

X Int. 5. Has the complainant given credit upon the three loans of the whole of the $3,863.95 paid by you on July 1st, 1881, and in doing so was the $927.35 credited upon this loan?

Ans. Yes, sir.

X Int. 6. Then, if the $927.35 is credited on this loan and the balance of the $3,863.95 credited on the other two loans, you paid July 1st, 1881, on this loan $927.35, and not $1,048.00, as you have stated; is not this correct?

Ans. No; it is not correct, because they made a mistake, as I stated before, in charging the interest at 8 and carrying out at 9; hence their apportionment was not right. At the time I remitted to them, July 1st, 1881, from their account I made out the amount of interest due on these three loans and remitted what was due and compounded interest at ten per cent. This left, according to a subsequent account they sent embracing all three of the loans, a deficiency of $229.80, they claiming in this same subsequent account that the total amount due on the three loans then, with the ten per

cent. compound interest added, was $4,093.75 instead of my computation of $3,863.95, which makes the difference of $229.80, this difference being made by the wrong charging of interest, they charging it at 8 per cent. and carrying it out at 9. This error
102 arose only in computation of interest on the $10,000 loan. It was set down at eight per cent. and carried at nine.

X Int. 7. If of the $3,863.95 you apportioned $1,048.00 as properly applicable to this loan, what part of the $3,863.95 was properly applicable to the other two loans specifically?

Ans. I put $1,572.00 on the E. S. Fowler loan—that is, if you add the $132.00 compound interest—and the balance went on the Sophie Fowler loan, which is $1,243.95.

X Int. 8. Have you that subsequent account of which you have spoken? If so, produce and exhibit it.

Ans. I here produce it and make it Exhibit "E" to this deposition.

103 "EXHIBIT A."

Int. on $6,000, 1 mo. 22 d'ys, @ 7 %..... $60.66
Amount of loan..... 6,000.00

6,060.66
Amount of money received..... 5,231.83

Amount retained June 27, '74..... 828.83
5

Interest, 6 mos..... 41.4415
828.83

Suffered in interest..... 870.27
90.00

780.27
5

39.0135
780.27

819.28
Difference interest..... 90.00

729.28
5

36.4640
729.28

765.74
Difference in int..... 90.00

675.74
5

33.7870
676.74

710.62
Dif. in int..... 90.00

620.62
5

6 mo. int..... 31.0310
620.62

651.65
Dif. in int..... 90.00

561.65
5

6 mo. int..... 28.0825
561.65

589.73
Dif. in int..... 90.00

499.73
5

6 mo. int..... 24.9865
499.73

524.71
Dif. in int..... 90.00

434.71
5

21.7.55
434.71

456.44
Dif. in int..... 90.00

366.44
5

18.3220
366.43

384.75

Dif. int..... 384.75
90.00

294.75
5

14.7375
294.75

309.48
90.00

219.48, with int. from May 1, '74.

7—322

104 EXHIBIT "B."

Equitable Trust Co., 27 Pine street.

NEW YORK, *July 1st*, 1881.

Dr. Edwin S. Fowler, Springfield, Ill.

DEAR SIR: Yours of the 29th ult. is received, enclosing remittances as follows:

Springfield Marine & F. Ins. Co. on Mrt. N't B'k, N. Y., $3,863.75.

EXHIBIT "C."

Equitable Trust Company, No. 27 Pine street.

NEW YORK, *Jan'y 30th*, 1882.

Received this day from Mr. Edwin S. Fowler eight hundred & no $\frac{100}{100}$ dollars in payment on acc't of the installment of interest on loan made by this company.

To Edwin S. Fowler, Rose H., & E. S. & S. Fowler.

EQUITABLE TRUST COMPANY.
EDWIN S. MARSTON,
Ass't Treasurer.

105 EXHIBIT "D."

NEW YORK OFFICE, 16 EXCHANGE PLACE,
NEW YORK, *Aug.* 14, 1882.

R. H. Fowler in account with the Equitable Trust Company of New London, Conn.

1879.		
Nov. 1.	To 6 mos.' interest on loan	240 00
1880.		
May 1.	" " " " " "	240 00
Nov. 1.	" " " " " "	240 00
1881.		
May 1.	" " " " " "	240 00
Nov. 1.	" " " " " "	240 00
1882.		
May 1.	" " " " " "	240 00
"	" " principal of loan	6,000 00
1882.		
July 31.	Insurance	20 37

CR.

1881.		
July 1.	By cash	927 35
1882.		
Jan. 30.	" "	192 00

Interest to be added to all items from their date to date of settlement.

106 EXHIBIT "E."

N. Y., *July 1st*, 1881.

Rose H. Fowler in ac. with the Equitable Trust Co.

			10 % interest.
1879.			
Nov. 1.	To 6 mos.' interest on loan	240 00	40 00
1880.			
May 1.	" " "	240 00	28 00
Nov. 1.	" " "	240 00	16 00
1881.			
May 1.	" " "	240 00	4 00
July 1.	" 10 % interest on above items	88 00	
			$1,048 00

Edwin S. Fowler in ac. with the Equitable Trust Co.

			10 % interest.
1879.			
Nov. 1.	To 6 mo. interest on loan	360 00	60 00
1880.			
May 1.	" " "	360 00	42 00
Nov. 1.	" " "	360 00	24 00
1881.			
May 1.	" " "	360 00	6 00
July 1.	" 10 % interest on above items	132 00	
			$1,572 00

Sarah & Edwin S. Fowler in ac. with Equitable Trust Co.

			10 % interest.
1880.			
Feb'y 1.	To 6 mos.' interest on loan	450 00	63 75
Aug. 1.	" " "	450 00	41 25
1881.			
Feb. 1.	" " "	450 00	18 75
July 1.	" 10 % interest on above items	123 75	
			$1,473 75

Recapitulation.

Rose H. Fowler	1,048 00
Edwin S. Fowler	1,572 00
Sarah & Edwin S. Fowler	1,473 75
	4,093 75
Cash rec'd July, 1881	3,863 95
Due E. T. Co. July 1, 1881	229 80

107 *Decree of October* 20, 1884.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER, SOPHIE FOWLER, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

And now, on this day, this cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was—

Ordered, adjudged, and decreed as follows, to wit: That by reason of the non-payment of the balance of the principal sum actually received by the defendant Rose H. Fowler, secured by said mortgage and bonds now due, to wit, the sum of twenty-one hundred sixty-two & $\frac{48}{100}$ dollars ($2,162.48), and the sum of twenty-three & $\frac{12}{100}$ dollars ($23.12), insurance paid by complainant and interest thereon, there is now due and unpaid to the said complainant the sum of twenty-one hundred eighty-five & $\frac{60}{100}$ dollars ($2,185.60), and also the costs of this suit.

It is therefore ordered, adjudged, and decreed that the said Rose H. Fowler, or some one of said defendants, or some one for them, pay to the master in chancery of this court, or cause to be paid, the said sum of twenty-one hundred eighty-five & $\frac{60}{100}$ dollars and
108 interest thereon from the day of the rendition of this decree, at the rate of six per centum per annum, and all the costs in this suit within five days from the rendition of this decree.

It is further ordered, adjudged, and decreed that in default of such payment being made as aforesaid that the master in chancery of this court proceed and sell forthwith the real estate described and conveyed in the said trust deed, said real estate lying and being in the county of Sangamon and State of Illinois and described as follows, to wit: Lots nine (9), ten (10), eleven (11), and twelve (12), in Constant's Second Adition to Springfield, Illinois; that said master sell said real estate for cash, to the highest and best bidder, at public vendue, at the front door of the court-room of this court, in the city of Springfield, Illinois, between the hours of 10 o'clock a. m. and sunset of the same day, to wit, at 12 o'clock m.; that he give twenty days' previous notice of the time and place and terms of said sale, describing said real estate with reasonable certainty, by advertisement in some newspaper published in the city of Springfield, Illinois, and that said complainant have the right to bid and become the purchaser at said sale; that he sell said real estate subject to redemption; that
109 said master execute to the purchaser at said sale a certificate of purchase, in pursuance of the statute laws of the State of Illinois relating to the redemption of real estate from sale under execution, certifying and specifying therein the lands purchased by such purchaser and the sum paid therefor, or, if purchased by the complainant in said bill, the amount of its bid and the time when the purchaser will be entitled to a deed for such lands, unless the same shall be redeemed according to law by the defendant Rose H. Fowler, her

heirs or assigns, within twelve months from the day of said sale and her judgment creditors within three months thereafter paying the purchase-money and interest thereon at the rate of eight per centum per annum, and that said master in chancery shall also file in the office of the recorder of deeds of Sangamon county, Illinois, a duplicate of such certificate, duly signed by him, and the said master, out of the proceeds of such sale, shall retain his fees, disbursements, and commissions on said sale; that he pay the officers of this court their costs in this suit, and that out of the remainder of said proceeds he pay to the complainant the said sum of twenty-one hundred eighty-five & $\frac{60}{100}$ dollars, together with interest thereon, at
110 the rate of six per centum per annum, from the date of this decree to the day of sale; or, if such remainder shall be insufficient to pay the whole of said amount and interest as aforesaid, then that he apply such remainder to the extent to which it may reach in satisfaction of said amount and interest, and that in case said premises shall sell for more than sufficient to pay the principal, interest, and costs in this suit, then, after making payment as aforesaid, the master shall bring the surplus money into court without delay; to abide the further order thereof.

It is further ordered, adjudged, and decreed that the defendants and all persons claiming by, through, or under them since the commencement of this suit be forever barred and foreclosed from all equity of redemption and claim of, in, and to said mortgaged premises or any part thereof if the same are not redeemed according to the laws of the State of Illinois in such case provided by the defendant Rose H. Fowler, her heirs, representatives, or grantees, within twelve months next after the day of sale and by her judgment creditors within the three months then and next thereafter, and that at the expiration of the fifteen months next after the day
111 of said sale, if said mortgaged premises or any portion thereof are not redeemed as aforesaid, then, upon the production to and filing with the master in chancery of this court of the certificate or certificates of purchase executed by the master as aforesaid, said master shall make, execute, and deliver to such purchaser or purchasers, their heirs, representatives, or assigns, good and sufficient conveyance or conveyances in fee simple of said premises or such portion thereof as shall have been sold to such purchaser or purchasers respectively.

And it is further ordered, adjudged, and decreed that upon the execution and delivery of the conveyance or conveyances as aforesaid the said purchaser or purchasers, his, her, or its representatives or assigns, be let into possession of the portion of said premises so conveyed to him, it, or them, and that any of the parties in this cause who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, on the production of the master's deed of conveyance and a certified copy of the order of this court confirming the report of said sale, shall surrender possession thereof to such purchaser or purchasers, their representa-

112 tives or assigns, and on refusal so to do will be considered in contempt of this court.

And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the amount so due the complainant, with interest as aforesaid, after deducting the costs and expenses of sale as aforesaid, that said master shall specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report the defendant Rose H. Fowler, who is personally liable for the payment of the debt secured by said trust deed, pay to the complainant the amount of such deficiency, with interest thereon from the date of such last-mentioned report, and that the complainant have execution therefor.

And thereupon the complainant entered its motion for a rehearing before a full bench.

Whereupon on said twentieth day of October, of the year last aforesaid, came the complainant, by its solicitor, and filed in the clerk's office of said court its motion and petition for a rehearing in this cause, which motion and petition are as follows, to wit:

113 *Motion for Rehearing.*

In the Circuit Court of the United States for the Southern District of Illinois. June Term, A. D. 1884.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER *et al.* } In Chancery.

Now comes the complainant, by its solicitor, and moves the court herein that this cause may be reheard and reargued, and that such rehearing and reargument may be had before the full bench of this court at such time as this court may fix—

Because it says the questions of law arising in this case are of the gravest importance and have never before been adjudged by this court; that under the ruling of this court, as now expressed, the rights and interest of this complainant corporation, as also the rights and interests of all other non-resident corporations having loans of money secured by mortgage on lands in this State, are or may be seriously affected, and because, in so grave and important a matter, the court itself may well require the fullest research and wisest suggestion of counsel.

W. L. GROSS,
Sol'r for Compl't.

114 *Petition for Rehearing.*

In the United States Circuit Court, Southern District of Illinois.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER *et al.* } In Chancery. Foreclosure.

The complainant above named respectfully petitions the court in

the above-entitled cause upon the entry of decree that a rehearing thereof be allowed before the full bench, and respectfully shows:

1. That, as the petitioner is advised and believes, the question involved in the decision of the court upon which decree has been entered is novel and wide-reaching and the decision contrary to the prevailing opinion of the bar, on the faith of which very large amounts of money have been invested by complainant and very many corporations.

2. That this question, although, perhaps, suggested by the pleadings, was abandoned upon the first hearing and was raised upon reargument without previous notice to the complainant's counsel.

3. That the argument of *ultra vires* is based upon the laws of the State of Connecticut, and the law of that State is before the
115 court only by judical notice, guided by what the petitioner is advised and believes to be incomplete and misleading statements of the defendant's counsel, the effect of which in the time allowed and with the facilities at hand, it was not feasible for the complainant's counsel to counteract.

4. It seems that the decision was based on the Revised Statutes of Connecticut of the year 1866. The penalty therein provided seems to have been applied herein; and yet the petitioner is advised and believes that the law of 1866 was entirely repealed in 1872 and has never been re-enacted. The law as to interest, which was passed in 1873, the petitioner is advised and believes, provides as the only penalty for usury the forfeiture of the excess of interest only, and that only in case of suit brought for the purpose within one year. The petitioner therefore believes that if the law of 1873 was at all before the court the Connecticut construction of that law was not brought to the attention of the court, and it is doubted whether the books of statutes and decisions of Connecticut were within the reach of the court or of the complainant's counsel.

5. The petitioner is advised and believes that later statutes
116 of Connecticut throw light upon the meaning of the statute of 1873, and that these later statutes should also be called to the attention of and considered by the court in determining this question.

6. That, as the petitioner is advised and believes, in the year 1875 a law was enacted in Connecticut, which has been in force ever since August 20th, 1875, expressly providing that when the borrower resided or the mortgage security was located in another State where the legal rate of interest was greater than in Connecticut the lender might accept and recover any agreed rate of interest not exceeding the rate legal in that other State; and yet, as the petitioner is advised and believes, this statute was not cited to or considered by the court, although its bearing in this case is manifest.

7. The petitioner is advised and believes that certain authorities in the United States courts which have important bearing on this case were not brought to the attention of the court.

All of which is respectfully submitted.

EQUITABLE TRUST COMPANY.

W. L. GROSS,
Of Counsel for Petitioner.

(Indorsed:) Filed October 20, 1884. J. A. Jones, clerk.

117 Afterwards, to wit, on the eighth day of June, in the June term of said court, in the year of our Lord one thousand eight hundred and eighty-five, the following further proceedings were had in said cause, to wit:

Order for Hearing before a Full Bench.

EQUITABLE TRUST COMPANY
v.
ROSE H. FOWLER *et al.*
} In Chancery.

On motion of complainant, by William L. Gross, Esq., its solicitor, this cause is set for hearing on the 29th day of June inst. before a full bench.

Then, afterwards, to wit, on the thirtieth day of June, in the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Granting Rehearing before Full Bench.

EQUITABLE TRUST COMPANY
v.
ROSE H. FOWLER *et al.*
} In Chancery.

(Entered as of October 31, 1884.)

Ordered that the prayer of the petition heretofore filed in said cause for a rehearing before a full bench be granted, and a rehearing is accordingly entered; to which order defendants then and there excepted.

118 *Supplemental Report of M. C.*

In the Circuit Court of the United States for the Southern District of Illinois.

EQUITABLE TRUST COMPANY
v.
ROSE H. FOWLER *et al.*
} In Chancery.

Supplemental report of John A. Jones, master in chancery of said court.

Said master reports that on the 11th day of January, 1887, the following further proofs were produced before him:

Sum actually advanced by the complainant to the defendant		$5,381 83
W. L. Gross, solicitor for complainant, states on oath that complainant, on July 25, 1882, paid for insurance on mortgaged property described in bill	$20 37	
Int. @ 10%, 4 yrs. 5 months 16 days	9 03	
		29 40
		$5,411 23

All which is respectfully submitted to the court.

J. A. JONES,
M. C., U. S. Cir. C't, S. Dist. Ill.

(Endorsed:) Filed January 11, 1887. J. A. Jones, clerk.

119 EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER, SOPHIE FOWLER, HENRY R. BOND, and ROBERT P. JOHNSTON. } In Chancery.

And now, on this day, this cause again came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

That by reason of the non-payment of the sum actually advanced by the complainant and secured by said trust deed and bonds, to wit, the sum of five thousand three hundred eighty-one dollars and eighty-three cents, and the further sum of twenty-nine dollars and forty cents insurance paid by the complainant, and interest thereon, there is now due and unpaid to the said complainant the sum of five thousand four hundred eleven dollars and twenty-three cents, and also the costs of this suit:

It is therefore ordered, adjudged, and decreed that the said
120 Rose H. Fowler, or some one of said defendants or some one for them, pay to the master in chancery of this court, or cause to be paid, the said sum of five thousand four hundred eleven dollars and twenty-three cents and interest thereon from the date of the rendition of this decree at the rate of six per cent. per annum and all the costs of this suit within sixty days from the rendition of this decree.

It is further ordered, adjudged, and decreed that in default of such payment being made as aforesaid that the master in chancery of this court proceed and sell forthwith the real estate described in and conveyed by the said trust deed, said real estate lying and being in the city of Springfield, in the county of Sangamon and State of Illinois, and described as follows, to wit:

Lots nine (9), ten (10), eleven (11), and twelve (12), in Constant's Second Addition to Springfield, Illinois.

That said master sell said real estate for cash to the highest and best bidder, at public vendue, at the north door of the Government building, in the city of Springfield, Illinois, between the hours of
121 10 o'clock a. m. and sunset of the same day, to wit, at 12 o'clock m.; that he give 20 days' previous notice of the time and place and terms of said sale, describing said real estate with reasonable certainty, by advertisement in some newspaper published in the city of Springfield, Illinois, and that said complainant have the right to bid and become the purchaser at said sale; that he sell said real estate subject to redemption; that said master execute to the purchaser or purchasers at said sale certificate or certificates of purchase in pursuance of the statutes of the State of Illinois relating to the redemption of real estate from sales under execution, certifying and specifying therein the lands purchased by said purchaser or

purchasers and the sum or sums paid therefor, or, if purchased by the complainant in said bill, the amount of its bid and the time when the purchaser will be entitled to a deed for such lands, unless the same shall be redeemed according to law by the defendant Rose H. Fowler, her heirs, assigns, or grantees, within twelve months
122 from the day of said sale and her judgment creditors within three months thereafter paying the purchase-money and interest thereon at the rate of eight per cent. per annum, and that said master in chancery also file in the office of the recorder of Sangamon, Illinois, a duplicate of such certificate or certificates, duly signed by him.

And the said master, out of the proceeds of such sale, shall retain his fees, disbursements, and commissions on said sale; that he pay all costs of this suit, and that out of the remainder of said proceeds he pay to the complainant the said sum of five thousand eleven dollars and twenty-three cents, together with interest *together with interest* at the rate of six per cent. per annum, from the date of this decree to the day of sale, or if such remainder shall be insufficient to pay the whole of said amount and the interest as aforesaid, then that he apply said remainder to the extent to which it may reach in satisfaction of such amount and interest, and that in case that the said premises shall sell for more than sufficient to pay the principal, interest, and costs in this suit, then, after making
123 payment as aforesaid, the master shall bring the surplus money into court without delay, to abide the further order thereof.

It is further ordered, adjudged, and decreed that the defendants and all persons claiming by, through, and under them or either of them since the commencement of this suit be forever barred and foreclosed from all equity of redemption and claim of, in, and to said mortgaged premises or any part thereof if the same are not redeemed according to the laws of the State of Illinois in such case provided by the defendant Rose H. Fowler, her heirs, representatives, and grantees, within twelve months next after the day of such sale and by her judgment creditors within the three months then next thereafter, and that at the expiration of the fifteen months next after the day of sale, if such mortgaged premises or any portion thereof are not redeemed as aforesaid, then, upon the production and filing with the master in chancery of this court of the certificate or certificates of purchase executed by the master
124 as aforesaid, — execute and deliver to such purchaser or purchasers, their heirs, representatives, or assigns, good and sufficient conveyance or conveyances in fee simple of said premises or such portion thereof as shall have been sold to such purchaser or purchasers respectively.

And it is further ordered, adjudged, and decreed that upon the execution and delivery of the conveyance or conveyances as aforesaid the purchaser or purchasers, his, her, or its heirs, representatives, or assigns, be let into the possession of the portion of said premises so conveyed to him, her, it, or them, and that any of the parties in this cause who may be in possession of said premises or any part thereof, and any person who, since the

commencement of this suit, has come into possession under them or either of them, on the production of the master's deed of conveyance and a certified copy of the order of this court confirming the report of said sale, shall surrender possession thereof to such purchaser or purchasers, their heirs, representatives, or assigns, and on refusal so to do will be considered in contempt of this court.

125 And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the amount so due the complainant, with interest as aforesaid, after deducting the costs of this suit and expenses of sale as aforesaid, the said master shall specify the amount of such deficiency in his report of sale, and that on the coming in and confirmation of said report the defendant Rose H. Fowler, who is personally liable for the payment of the debt secured by said trust deed, pay to the complainant the amount of such deficiency, with interest thereon from the date of such last-mentioned report, and that the complainant have execution therefor.

And the said defendant, Rose H. Fowler, in open court prays an appeal from said decree to the Supreme Court of the United States, said appeal to be a supersedeas, which is granted upon her giving bond, within sixty days from the entry of said decree, in the sum of five hundred dollars, with security to be approved by one of the judges of this court.

126 And the complainant, The Equitable Trust Company, in open court prays an appeal from said decree to the Supreme Court of the United States, which is granted upon its giving bond, within sixty days from the rendition of said decree, in the sum of five hundred dollars, with security to be approved by one of the judges of this court.

127 Supreme Court of the United States.

EQUITABLE TRUST COMPANY
vs.
ROSE H. FOWLER, SOPHIE FOWLER, HENRY R. BOND, & ROBERT P. JOHNSTON. } In Chancery.

Know all men by these presents that we, Sophie Fowler, Edwin S. Fowler, George N. Black, P. W. Harts, and Dennis Riordan, are held and firmly bound unto the Equitable Trust Company in the sum of five hundred dollars, to be paid to the said Equitable Trust Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1887.

Whereas the above-named Sophie Fowler has prayed an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois: Now, therefore,

the condition of this obligation is such that if the above-named Sophie Fowler shall prosecute her said appeal to effect and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

E. S. FOWLER. [SEAL.]
SOPHIE FOWLER. [SEAL.]
GEO. N. BLACK. [SEAL.]
P. W. HARTS. [SEAL.]
DENNIS RIORDAN. [SEAL.]

Sealed and delivered in the presence of—
BLUFORD WILSON.

Approved March 15th, 1887.
S. H. TREAT.

Endorsed: Filed March 15th, 1887. J. A. Jones, cl'k.

128 Supreme Court of the United States.

EQUITABLE TRUST COMPANY *against* ROSE H FOWLER *et al.* } In Chancery.

Know all men by these presents that we, The Equitable Trust Company of New London, Connecticut, and B. H. Ferguson, of Springfield, Illinois, are held and firmly bound unto Rose H. Fowler and others, the defendants in the above-entitled cause, in the sum of five hundred dollars, to be paid to the said Rose H. Fowler and others, their executors or administrators; for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this first day of March, 1887.

Whereas the above-named Equitable Trust Company hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Equitable Trust Company shall prosecute its said appeal and answer all costs and damages if it shall fail to make
129 good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EQUITABLE TRUST CO.,
[L. S.] By J. A. ROOSEVELT, *Pres.*
Attest: W. EMBRY ROOSEVELT, *Sec'y.*
B. H. FERGUSON. [L. S.]

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

CITY AND COUNTY OF NEW YORK:

On this first day of March, 1887, before me, a notary public in and for the county aforesaid, duly commissioned, personally appeared James A. Roosevelt and W. Embry Roosevelt, to me personally known and known to me to be respectively the president and secretary of the Equitable Trust Company above mentioned and who, as such president and secretary, executed the foregoing instrument, and they acknowledged the execution of said instrument by the said company, and that they had executed the same, affixing the corporate seal thereto as such president and secretary, duly authorized thereto on behalf of the said company.

Witness my hand and notarial seal the day and year last above written.

[L. S.] PATRICK HOGAN,
Notary Public, Kings County.

Certificate filed in New York county clerk's office.

Approved:
S. H. TREAT,
Dist. Judge.

(Endorsed:) Filed March 15, 1887. J. A. Jones, cl'k.

130 UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of the papers filed and proceedings thereon had in a certain cause wherein The Equitable Trust Company is complainant and Rose H. Fowler, Sophie Fowler, Henry R. Bond, and Robert P. Johnston are defendants as the same appear of file and record in my said office.

In testimony whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

JAMES T. JONES, *Clerk.*

Endorsed on cover: S. Illinois C. C. U. S. No. 322: Rose H. Fowler, appellant, *vs.* The Equitable Trust Company. No. 323: The Equitable Trust Company, appellant, *vs.* Rose H. Fowler *et al.* Filed February 4, 1888.

Supreme Court of the United States,

OCTOBER TERM, 1890

No. 322.

ROSE H. FOWLER, *Appellant*,

v.

EQUITABLE TRUST COMPANY.

No. 323.

EQUITABLE TRUST COMPANY, *Appellant*,

v.

ROSE H. FOWLER, et al.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF AND ARGUMENT.

WILLIAM L. GROSS,
Solicitor for Equitable Trust Co.

SPRINGFIELD, ILL.:
H. W. ROKKER, STATE PRINTER AND BINDER.
1891.

Supreme Court of the United States,

OCTOBER TERM, 1890

No. 322.

ROSE H. FOWLER, *Appellant*,

v.

EQUITABLE TRUST COMPANY.

No. 323.

EQUITABLE TRUST COMPANY, *Appellant*,

v.

ROSE H. FOWLER, et al.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF AND ARGUMENT.

WILLIAM L. GROSS,
Solicitor for Equitable Trust Co.

STATEMENT.

On June 6, 1874, Mrs. Rose H. Fowler, widow, residing at Springfield, Illinois, made written application to the Equitable Trust Company, addressed to it at its New York office, for the loan of $6,000 for 3 years, at 10 per cent. interest per annum, payable semi-annually, and offering as security her 4 lots of ground, improved and occupied by her as a residence, valued by her at $18,000. *Trans. of Rec. pp. 38, 39.*

R. P. Johnston, then a resident of Springfield, and "engaged in the real estate and loan business," had prior to the date of Mrs. Fowler's application, been furnished with the "blanks" used by the Trust Company in making loans, and instructed how to fill them out. He prepared Mrs. Fowler's application, recommended the loan as applied for and forwarded the application with the usual abstract of title to the Trust Company at New York. Subject to the modification, required by the Trust Company, that the loan should be for the term of 5 instead of 3 years, the application of Mrs. Fowler was accepted. The Trust Deed and bonds were sent to the Trust Company at New York for examination, and having been found correct were returned for execution; and the same with the 6 $1,000 bonds and semi-annual interest coupons, on June 22, 1874, were duly executed and acknowledged by Mrs. Fowler.

The Trust Deed, bonds and interest coupons all bore date, May 1, 1874. It appears from the deed that it was given to secure "6 certain coupon mortgage bonds" of even date therewith, by which obligor bound herself to pay to the Trust Company the principal sum of $6,000, five years thereafter, with interest thereon at 7 per cent. per annum, payable semi-annually on the first days of November and May in each year, until the principal sum should be fully paid—both principal and interest being payable at the office of the Trust Company in the City of New York—the installments of interest for the 5 years being evidenced by 60 interest coupons of $35 each; and it was in the Deed recited: that "said bonds for $6,000 were given to secure a loan of that amount, payable 5 years after date thereof, with interest at 10 per cent. per annum, * of which said interest 7 per cent. per annum is secured by this trust deed and is to be paid as in said bonds provided, and the balance to-wit, 3 per cent. per annum has been discounted and the same, less the discount thereon, paid at the time of the execution of these presents." *Trans. of Rec. p. 14.*

It was stipulated in the bonds that the same should, after maturity, draw interest at 10 per cent. per annum.

In case of default, the trustee was authorized to sell the mortgaged premises, and out of the proceeds to pay costs and charges of the trust, "including commissions such as are at the

time allowed by the laws of Illinois to sheriffs on sale of real estate on execution, etc.", insurance premiums paid, and taxes or redemption from tax sales paid, with 10 per cent. interest thereon, and the unpaid mortgage debt and interest, etc. *Trans. of Rec. p. 16.*

On the same day, June 22, 1874, Johnston wrote to the President of the Trust Company, that he had forwarded by express the 6 bonds of Mrs. Fowler, and that he should, the next day, draw on him in favor of Mrs. Fowler, "as per following account:"

"Par value of bonds	$6,000 00	
"Less discount from May 1, 1874, to May 1, 1879	694 80	
		$5,305.20
"Interest from May 1, 1874, to June 23, 1874, 1 mo., 22 days		76.63
		"$5,381.83

"The approval of Richmond Wolcott, attorney, of the title of this security, will be forwarded with the (insurance) policies tomorrow."

Accordingly, on the next day, June 23, 1874, Johnston drew a draft to the order of Mrs. Fowler, upon the Trust Company at New York, for the sum shown by that account, $5,381.83, which Mrs. Fowler received, indorsed and, through her father, John Marvin, collected in full. *Trans. of Rec. pp. 39, 40.* As to payment of draft, see Johnston's testimony, *Ibid.* p. 37, and Marvin's testimony, *Ibid.* p. 43.

Why the Trust Deed and bonds were made to run from May 1st, instead of from a date subsequent to Mrs. Fowler's application, rests in inference. The blanks used—trust deed, bond, and coupons, were so printed as to make the semi-annual interest fall due May 1st and November 1st, and the making of loans commence with and run from one of these dates, appears to have been the course of business of the Trust Company. It is apparent, however, from the statement made by Johnston, of the present value of the securities executed by Mrs. Fowler, that she was allowed and paid 10 per cent. per annum on the face value of the securities, for the 1 month and 22 days which had run, before the proceeds of the securities was paid to her.

Johnston had an understanding with the Trust Company before this loan was made, by which the Trust Company furnished him the blank applications, and the blank for reporting any loan proposed (same as in this case "Ex. A & B"), and instructed him how to fill such blanks; but the Trust Company did not undertake to pay him anything in respect to any loan applied for through him—in that matter leaving him to collect his brokerage from the borrower. *Trans. of Rec., pp.* 37, 38.

Before Mrs. Fowler made application for this loan through Johnston, she agreed with Johnston that, on the completion of this loan, she would pay him a commission of $150. On the day the transaction was closed, or the next day, Mrs. Fowler paid Johnston the sum agreed, $150. In his testimony Johnston says: "The draft for $5,381.83 exhibited was for the full value of this loan on the day it was negotiated, and no deduction was made therefrom by me on account of my said commission, or on any other account whatever. The agreement between myself and the defendant was unknown to the complainant, and no part of my said commission went to or was paid to the complainant." (*Trans. of Rec., p.* 37). "In the negotiations of this loan, from its inception to its completion, I acted as the medium of communication between the complainant and the defendant. I was not authorized, nor did I attempt, to accept or reject the defendant's application for this loan, excepting so far as to recommend its acceptance by the complainant; nor did I pass on the question of title to the real estate, the whole matter having been submitted to and decided by the complainant in New York; nor for what I did in connection with this loan was I paid by the complainant anything; nor was I authorized to do anything by the complainant in connection with this loan, more than I did and as here shown." *Ibid., p.* 37.

John Marvin, 85 years old at the time of testifying, acted for his daughter, Mrs. Fowler, in respect to this loan, and the draft given to Mrs. Fowler was by her indorsed. It was then indorsed by her father, the witness, who collected the full amount thereof through the First National Bank of Springfield. In his testimony Marvin says that all he received on the loan for Mrs. Fowler was $5,231.83; that $60.66 of the draft was accrued interest for 1 month and 22 days; that he paid Johnston $150

commission; and that "the discount and commission was all put together and taken out before the draft was drawn."

The conflict between the statements of this witness and the documentary evidence produced by Johnston, is accounted for by the fact that the old gentleman was speaking from recollection alone, before Johnston had testified, and before "Ex. B" and "Ex. C," the draft itself, had been produced. He was not afterwards called to explain or reconcile the conflict.

The report of the Master, to whom the cause was referred "to take testimony and compute the amount due," shows, (*Trans. of Rec., p.* 35), that the Trust Company claimed nothing for interest accruing before the maturity of the bonds, but did claim as unpaid the whole of the principal and 10 per cent. interest thereon after maturity.

It further shows an allowance by the Master of interest on the whole principal after maturity, at the contract rate, 10 per cent. per annum, and that the Trust Company admitted certain payments on account of interest accrued *after* maturity of the principal.

It also shows an allowance for insurance paid by the Trust Company, and interest thereon, and an allowance for solicitor's fees, as prayed—"being same as sheriff's fees of circuit courts of Illinois."

And the report, to which no exception was made or taken, is thus summarized:

Principal of bonds		$6,000 00
Interest from maturity to date of report, 3 years, 11 months, 1 day	$2,351 66	
Interest after maturity, paid	1,119 35	
		1,232 31
Insurance paid and interest thereon		21 75
Solicitor's fees		111 81
Total amount due April 2, 1883		$7,365 87

THE BILL AND ANSWERS.

THE BILL,—*to foreclose*. Allegations: The complainant a Connecticut corporation, principal office New London, branch office, city of New York, citizen of Connecticut: defendant, citizen of Southern District of Illinois; defendant indebted for borrowed money, on 6 $1,000 interest coupon bonds, maturing May 1,

1879, with interest after maturing at 10 per cent. per annum, payable in New York city; defendant conveyed in fee simple to Jonathan Edwards lands described, *in trust*, to secure the bonds and interest, subject to defeasance on payment, etc.; upon death, etc., of trustee, title to vest in successor trustees named; upon default, trustee to sell premises and apply proceeds, etc. including such commission as by the laws of Illinois are allowed to sheriffs on sale of real estate on execution, etc.; default as to principal, and interest after maturity, and to keep premises insured, etc.; death of trustee Edwards, and refusal of successor trustees to act, resort to equity necessary; equitable proceedings necessary, complainant entitled, as part of expenses and in lieu of usual solicitor's fee, to same commission allowed sheriffs in Illinois on execution sales; mortgaged premises forfeited, subject to redemption; sworn answer waived. Prayer: for account of principal and interest after due, solicitor's fees, paid for insurance, decree for full payment, sale of premises, and process. *Trans. of Rec. pp 2–13.* Trust deed. *Ibid.* pp. 13–19.

Answers,—*original answer.* About May 1, 1874, Johnston, doing business in Springfield for trust company, proposed loaning defendant $6,000, for 5 years at 8 per cent. interest, which defendant accepted, and executed and delivered the bonds and trust deed; bonds usurious in this, while the bonds aggregate $6,000, defendant only received in considertion thereof, $5,256.83, the balance of the $6,000, being retained and claimed by Johnston as compensation for negotiating the loan, which was a device to conceal usury and avoid the statute; pleads statute of Illinois.[1] Admits complainant is a Connecticut coporation; says by laws of Connecticut it is forbidded to loan money at greater rate than 7 per cent.; that in conducting its business with defendant it sought to evade the laws of its creation; that it was without power under Connecticut laws to transact the business with defendant; that it was not granted power to loan money at interest in any State other than Connecticut and could not loan money at interest in Illinois, wherefore bonds are void.

---

[1]Amended answer to follow here.

Denies complainant's right to relief, etc. *Trans. of Rec., pp. 22, 23.*

Amended Answer. At the date of bonds complainant was loaning money in Springfield, through the agency of Johnston; defendant applied to said agency to borrow $6,000 for 5 years, at 10 per cent. per annum, which was accepted. Upon making bonds and trust deed it was corruptly agreed that the bonds should be for $6,000, at 7 per cent. interest per annum, and the difference between 7 and 10 per cent. should be deducted in advance from the $6,000 for the five years, and defendant should pay Johnston $150 as his commission. Accordingly, she gave the bonds for $6,000, at 7 per cent., "*and received only so much of said $6,000 as was left after deducting therefrom said difference between 10 and 7 per cent. per annum for 5 years, and* by paying said sum of $150 to said Johnston.*"

Further, that the contract for the loan of said money is a New York contract, and by the laws of that State is usurious and pleads the statute of New York. *Trans. of Rec., pp. 34, 35.*

POINTS OF DEFENSE AS PLEADED.

1. USURY. (*a*) *Original Answer:* Contract of loaning $6,000 for 5 years, at 8 per cent.: only received thereon $5,256.83, balance, $743.17, retained by agent of complainant. (*b*) *Amended Answer:* Contract of loaning $6,000 for 5 years, at 10 per cent.; 7 per cent. reserved in bonds, 3 per cent. for 5 years, and agent's commission of $150, deducted in advance, and defendant only received $4,950. (*c*) New York contract, violative of the laws of that State.

2. ULTRA VIRES. *Original Answer:* Connecticut corporation, without power to loan money in Illinois for more than 7 per cent., or to loan in Illinois at all.

---

* Erroneously printed in the Record "since."

Orders payment, and on default, sale of premises, etc. *Trans. of Rec. pp. 52, 54.*

MOTION AND PETITION FOR REHEARING. BEFORE FULL BENCH.

Filed October 20, 1884. *Trans. of Rec. pp. 54, 56.*

ORDER OF ALLOWANCE, *Nunc Pro Tunc. Trans. of Rec. p. 56.*

DECREES COMPARED.

Decree, Oct. 20, 1884.

Sum actually advanced		$5,381 83
Int. paid to maturity	$2,100 00	
Int. paid after maturity	1,119 35	
		3,219 35
Balance of principal actually received by deft		$2,162 48
Ins. and int		23 12
Amount found and decreed		$2,185 60

Decree, Jan. 11, 1887.

Sum actually advanced	$5,381 83
Ins. and int	29 40
Amount found and decreed	$5,411 23

ACTION OF COURT ON FINAL HEARING.

"CHICAGO, January 11, 1887.

"*Hon. S. H. Treat, Springfield, Ill.:*

"DEAR JUDGE: I have looked into the cases of the Equitable Trust Company vs. Rose H. Fowler, Same vs. Edwin S. Fowler, and Same vs. Sophie Fowler. While I do not think the defense of usury is sustained in the latter case, namely, the suit against Sophie Fowler, I think the evidence does show that the complainant exacted and received usury in the other two cases. Johnston represented the complainant at Springfield. He was furnished with blank applications, notes, bonds and mortgages, and received instructions how he was to act as the complainant's agent. He was none the less the complainant's agent because of the agreement between him and the complainant by which he was to obtain compensation for his services from borrowers, and charge the complainant nothing for such services. His arrangement with the complainant was, in effect, that he was to do certain things for it, for which he was to be compensated by borrowers, or not at all. It is idle, therefore, to say that in effecting these loans Johnston acted as the agent of the defendants. As the complainant's agent or representa-

tive, he sent papers and information to it, with his recommendations for its action. His suggestions and opinions had weight with the complainant, because he was its agent. On the assumption, however, that the commissions were matters wholly between the defendants and Johnston, and not proper charges against the complainant, yet, it exacted and received more than 10 per cent. upon the amount actually paid over to Edwin S. and Rose H. Fowler. If the complainant was authorized to retain or discount part of the interest in advance, it was authorized to discount or retain the entire interest in advance, which would lead to a result so palpably unjust that no court could be expected to sustain it. It does not follow that because interest may be thus reserved, or discounted, on short loans, that it can be so reserved on loans for five or ten years.

"I think the complainant is entitled to a foreclosure of the Sophie Fowler mortgage for the amount of principal and interest, and a foreclosure of the other two mortgages for the amounts actually advanced to the defendants, with interest from the date of the decree; not, however, treating the interest paid as credits upon the principal. Will you please have decrees entered in these cases in accordance with the views herein expressed? Perhaps the counsel can make the computations without any reference.

"I go to Madison this evening where I shall be detained ten days or two weeks.

"Yours truly,

[Signed]. "W. Q. GRESHAM."

SUPPLEMENTAL REPORT OF MASTER.

Sum actually advanced to defendant	$5,381 83
Paid for insurance and interest thereon	29 40
Total amount due	$5,411 23

FINAL DECREE OF JANUARY 11, 1887.

Because of non-payment of sum actually advanced by complainant and secured by the trust deed and bonds, to wit, $5,381.83, and $29.40 insurance paid and interest thereon,

there is due to complainant and unpaid $5,411.23. Payment ordered, and on default sale of premises, etc.

Prayer for appeal by both defendant and complainant, allowed. *Trans. Rec. pp. 57-59.*

CHARTER OF EQUITABLE TRUST COMPANY.

(Trans. of Rec., in Case of Sophie Fowler v. Equitable Trust Co., being No. 324, pp. 57—61).

Act of June 19, 1869, General Assembly of Connecticut, incorporating the *Ocean Trust Company*—Name changed to *Equitable Trust Company*.[1]

"§ 1. * * And by that name shall be capable in law to purchase and hold all kinds of property, real, personal, and mixed, and the same at pleasure to lease, hold and convey; to sue and be sued, plead and be impleaded, in all courts; to have and use a common seal, and the same to alter at pleasure; to make and carry into effect all such by-laws and regulations as may be deemed expedient for the proper management of the affairs of the corporation not repugnant to the charter, the laws of this State or the United States, and generally to do and cause to be done and executed all such acts and things as may seem necessary and proper within the limitations aforesaid:[2] Provided, that the office and place of business of said company shall be in the city of New London, etc.

"§ 2. The corporation hereby created shall also have power to receive money in trust and on deposit, and to allow and pay interest on said money, *and to loan the same at any rate of interest allowed by law;* may take and receive on deposit or in custody for safe keeping, bonds, plate, jewelry, stocks, and other valuable property, upon such terms and for such compensation as may be agreed upon, etc. (Remaining portion of § 2 and all of § 3, repealed).

"§ 4. It shall be lawful for the corporation hereby created to take and hold any real or personal estate, in trust or otherwise, as security for and in payment of loans and debts due or to become due to the said company, to purchase real estate or any other property at any sale made in virtue of any loan,

[1] By act of June 22, 1871. *Trans. of Rec., Case No. 324, p. 60.*

[2] *Proviso* added by act July 6, 1870. *Ibid. p. 60.*

debt, or mortgage made or held by said company, and to receive or take in satisfaction of any such loan or debt any real estate or other property, and to hold and convey the same at pleasure.

* * * * * * * * * * *

ACT *amending charter of Equitable Trust Company.*

(May Session, 1872).

§ 1. (Authorizing increase of capital stock).

"§ 2. That said company is hereby authorized to elect ten trustees in addition to the number and in the manner now provided by law, and may have such offices and agencies in other States as may be necessary for the transaction of its legitimate business: *Provided*, That the office, books and records of said company shall be kept at New London, in this State, and be at all times open and subject to the inspection of the bank commissioners.

"§ 3. Said company may take such securities for loans as are now authorized by its charter, in such form, and may sell and dispose of the same in such manner as it may determine, and may guarantee the payment of the principal and interest of such securities. * * *"

ILLINOIS INTEREST STATUTES.

IN FORCE WHEN LOAN WAS MADE.

[*Ch. 74, R. S., 1874. "Interest." Took effect July 1, 1874.*]

1. Act 30 January, 1849, Section 1: Gross' Stats., 1869, 370, Section 4. "Money may be loaned at such rate of interest, not exceeding 10 per cent. per annum on each $100, as the parties may agree upon."

2. Act 12 Feb., 1857: Gross' Stats. 1869, 371 Sec. 13. "Where any contract or loan shall be made in this State, or between citizens of this State and any other State or country, bearing interest at any rate which was or shall be lawful according to any law of the State of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State or Territory of the United States, or in the city of London, England; and in all such cases such contract or loan shall be deemed and con-

sidered as governed by the laws of the State of Illinois, and shall not be affected by the laws of the State or country where the same shall be made payable."

3. Act 16 Feb. 1857: Gross' Stats. 1869, 372 Secs. 14, 15 and 16. § 14. "It shall be lawful for any person or corporation borrowing money in this State, to make notes, bonds, bills, drafts, acceptances, mortgages, or other securities, for the payment of principal or interest at the rates authorized by the laws of this State, payable at any place where the parties may agree, although the legal rate of interest in such place may be less than in this State; and such notes, bonds, * * shall not be regarded or held to be usurious; nor shall any securities taken for the same, or upon such loans, be invalidated in consequence of the rate of interest of the State, Kingdom or Country where the paper is made payable, being less than in this State, nor of any usury or penal laws therein."

§ 15. "No plea of usury nor defense founded upon an allegation of usury shall be sustained in any court in this State, nor shall any security be held invalid on an allegation of usury where the rate of interest reserved, discounted or taken does not exceed that allowed by the laws of this State, in consequence of such security being payable in a State, Kingdom or Country where such rate of interest is not allowed."

§ 16. "It shall be lawful for all parties loaning money in this State, to take, reserve or discount interest upon any note, bond, bill, draft, acceptance or other commercial paper, mortgage, or other security, at any rate authorized by the law of this State, whether such paper or security for principal or interest be payable in this State, or in any other State, Kingdom or Country, without regard to the laws of any other State, Kingdom or Country; and all such notes, bonds, bills, drafts, acceptances, or other commercial paper, mortgages or other security, shall be held valid in this State, whether the parties to the same reside in this State or elsewhere."

"§ 26. Foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. * * " R. S. 1874, Ch. 32, "Corporations," p. 290 § 26.

This section, "by the most direct implication, authorized foreign corporations to acquire real estate in satisfaction of any liability or indebtedness to them."

Columbus Buggy Co. v. *Graves*, 108 Ill., 459.

"That any corporation formed under the laws of any other State or country, and authorized by its charter to invest or loan money, may invest or loan money in this State. And any such corporation that may have invested or lent money as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this State; and when a sale is made under any judgment, decree or power in a mortgage or deed, such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title whenever a natural person might do so in like case. * * " Act April 9, 1875. Starr & Curtis' Stats., p. 628.

This act "was not restrictive but an enabling act, and it did not take away from foreign corporations the power to acquire real estate which was given to them by the General Corporation Act" of 1872.

Columbus Buggy Co. v. *Graves*, 108 Ill., 459.

The loaning of money in Illinois by a foreign corporation, and securing the same upon real estate, is not prohibited by any legislation of the State, and is not contrary to public policy.

Stevens v. *Pratt*, 101 Ill., 206, overruling *Mortgage Co.* v. *Gross*, 93 Ill., 483.

Commercial Union Assurance Co. v. *Scammon*, 102 Ill., 46.

Brown v. *Mortgage Co.*, 110 Ill., top of p. 242.

sidered a
shall no
the same
3. Act
and 16.
tion bor
drafts, a
ment of
laws of t
agree, al
be less t
shall not
curities t
in conse
or Coun
in this S
§ 15.
tion of t
shall an
where th
not exce
quence c
Country
§ 16.
this Sta
bond, bil
or other
whether
able in
without
Country
other co
valid in
this Sta

STATUTES OF ILLINOIS.

COMMISSION ALLOWED SHERIFFS, ON EXECUTION SALES.

In Force when Mortgage was Made.

"* * There shall be allowed to the several sheriffs in this State a commission of 3 per centum on all sales of real and personal estate which shall be made by virtue of any execution, or any decree of a court of chancery, when the money arising from such sales shall not exceed $200; but in all cases where the amount of such sale shall exceed that sum, then 1½ per cent commission on the excess only shall be allowed." R. S. 1874, p. 511, last ¶ of § 19.

ERRORS ASSIGNED.

1. The Court erred in denying the Trust Company relief for the full amount of the principal of the bonds, and the unpaid balance of the interest thereon, at the contract rate, from maturity to date of decree.

2. In denying the Trust Company relief, as to commissions for its solicitor, at the rate allowed sheriffs in Illinois on execution sales of real estate.

POINTS AND AUTHORITIES.

I.

CORPORATIONS, EXERCISE OF POWERS IN OTHER STATES.

As to Contracts.

A corporation dwells in the State under whose laws it is created, and such residence creates no insuperable objection to the exercise of its powers of contracting in another State.

The presumption, under the general comity among States, prevails that, unless forbidden by its charter, a corporation may exercise corporate powers in other States unless prohibited therefrom by the public policy of such other State.

Christian Union v. *Yount*, 101 U. S., 352.

Accordingly, in exercising corporate powers extra-territorially, it is for the local sovereignty to prescribe the terms and conditions upon which the presence of a foreign corporation for the conduct of its affairs may be permitted.

St. Louis v. *Ferry Co.*, 11 Wall., 423.

Carroll v. *E. St. Louis*, 67 Ill., 568.

The power to contract existing, it may be exercised by the corporation in the same way as a natural person may contract.

McKiernan v. *Lenzen*, 56 Calaf., 61.

II.

CONTRACTS BY CORPORATIONS IN VIOLATION OR EXCESS OF CHARTER POWERS.

Charter Power: *To Loan Money "At any Rate of Interest Allowed by Law."*

PLEA OF ULTRA VIRES.

In construing the charter of the United States Mortgage Company, organized under the laws of New York, wherein authority was given to lend money on bond and mortgage of real estate situated within the United States, and where the contention was, that the corporation was limited by the rate of interest fixed by the laws of New York, the holding was: "We concur with the Court below in holding this position to be untenable. Reasonably construed, the appellant's charter authorized it to con-

tract for such rate of interest as was lawful in the State where the contract of loan was made, and where the property mortgaged to secure the loan was situated. * * When New York created the Mortgage Company, with power to loan money upon real estate anywhere within the United States, and prohibited it from lending money at a rate of interest exceeding the legal rate, it did not intend to withhold from it the power to contract in other States for interest upon moneys loaned upon terms less favorable than those States permitted in respect to loans there made by other corporations and by individuals."

United States Mortgage Co. v. *Sperry*, (Feb. 2, 1891) Sup. Court Rep., pp. 321, 328.

Under the doctrine of comity among States, persons or corporations may go into other States and there transact any lawful business, so long as by so doing they do not controvene the policy of such other States.

The policy of the State of Illinois, in respect to contracts between citizens of that State and citizens or corporations of other States, is shown by legislative enactment. Statute p. 14 V

[Chap. 74, "Interest," R. S. 1874, p. 615, § 8.]

"When any bond, bill, draft, acceptance, mortgage, or other contract, shall have been or shall be made in this State, or between citizens of this State, or a citizen of this State and any other State, Territory or country, bearing interest at a rate lawful by the laws of this State, may be made payable in any other State, Territory or country, such contracts shall be governed by the laws of this State." Re-enactment of act of Feb. 12, 1857, 1 Gross' Stats. 1869, p. 371, § 13.

Story on Conflict of Laws, 11 Ed., § 278.

The general rule is, that the plea of *ultra vires* shall not prevail when, instead of advancing justice, it would accomplish a wrong; and it makes no difference, in this respect, whether it is interposed for or against the corporation."

Darst v. *Gale*, 83 Ill., 140.

Alexander v. *Tolleston, Club* 110 Ill., p. 73.

As deducible from a consideration of all the authorities, the rule is thus stated: "After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an un-

authorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract," to enforce its provisions.

2 Morawitz Priv. Corpn., § 689, *et seq.*

Although, in making a contract, the corporation may act in disagreement with its charter, if the question is simply as to its capacity or authority to contract under its charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity.

Township of Pine Grove v. *Talcott*, 19 Wall. p. 678.

Sedgwick's Statutory and Constitutional Law, p. 90, and Cases cited.

Germantown, etc., Ins. Co. v. *Dhein*, 43 Wis. 420: 28 Amer. Rep., 549.

Steam Navigation Co. v. *Weed*, 17 Barb., 378.

2 Morawitz Priv. Corpn., § 695, and Cases cited, notes 1, 4. See also §§ 673 and 696 *a*, and Cases there cited.

Bishop on Contracts, § 286, Enlarged Edition.

Mutual Life Ins. Co. v. *Wilcox*, 9 Biss., 203.

National Bank v. *Matthews*, 98 U. S., 621.

Gold Mining Co. v. *National Bank*, 96 U. S. 640.

If a corporation "contracts with reference to a subject within its powers, but in so doing exceeds them, the person with whom it deals cannot set up such violation of its franchises to avoid the contract."

Littleworth v. *Davis*, 50 Miss., 403.

Haynes v. *Covington*, 13 S. and M. (Miss.), 411.

Pancoast v. *Travelers Ins. Co.*, 79 Ind., 172.

Commercial Bank v. *Nolan*, 7 How. (Miss.), 508.

Little v. *O'Brien*, 9 Mass., 423.

The execution of a mortgage to a corporation is an admission of the competency of the corporation to enforce its rights thereunder.

Biglow on Estoppel, p. 424, and Cases cited.

Even if the corporation contracted for a greater rate of interest than was provided in its charter, yet, if it did not violate the general usury laws governing the contract, it would not constitute usury.

Lyon v. *State Bank*, 1 Stew. (Ala.), 468.

Commercial Bank v. *Nolan*, 7 How. (Miss.), p. 529.

While, therefore, the taking of interest by a corporation beyond the rate authorized by the law governing it would be a violation of its charter, for which the State might apply a remedy, yet, if the law does not declare that such act shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery.

Fleckner v. *Bank*, 8 Wheat. p. 355.

The remedy rests with the State, by *quo warranto* to dissolve the corporation.

The Banks v. *Poitiaux*, 3 Randolph, p. 142.
Silver Lake Bank v. *North*, 4 Johns., Ch. 370.
Wade v. *Amer. Col. Soc.*, 7 S. & M. (Miss.), p. 697.
Alexander v. *Tolleston Club*, 110 Ill., 65.
Fleckner v. *Bank*, 8 Wheat., p. 355.
Barnes v. *Suddard*, 117 Ill., 237.
Mutual Life Ins. Co. v. *Wilcox*, 8 Biss., 203.
National Bank v. *Whitney*, 103 U. S., 99.

III.

THE LAW OF THE CONTRACT.

Bonds executed by Residents of and Secured upon Lands Lying in Illinois, but payable in New York, Interpreted and Controlled by the Law of Illinois.

In its simplest form the rules is, "when there are two conflicting laws, that will be accepted which will best sustain an obligation."

Wharton's Evidence § 314.

And no better exposition of this doctrine can be found than that given by Mr. Justice Swayne in *Miller* v. *Tiffany*, 1 Wall., page 310: "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usuary." *Andrews* v. *Pond*, 13 Peters 77, 78; *Curtis* v. *Leavitt*, 15 N. Y. 92; *Berrien* v. *Wright*, 26 Barbour 213.

"The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at

the place of performance, the parties may lawfully contract in that case also for the higher rate." *Depeau* v. *Humphrey*, 20; Howard [8 Martin, La.] 1; *Chapman* v. *Robertson*, 6 Paige, 634.

"These rules are subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there it is so everywhere." *Andrews* v. *Pond*, 13 Peters 78; *Mix* v. *Madison Ins. Co.*, 11 Ind., 117; *Corcoran* v. *Powers*, 6 Ohio St. 19.

So, if a note payable in New York, be given in the State of Illinois for money lent there, reserving 10 per cent. interest, which is legal in that State, the note is valid, although but 7 per cent. interest is allowed by the laws of the former State.

Scudder v. *Union National Bank*, 91 U. S. 406.

In *Chapman* v. *Robertson*, the contract of loan was made in New York upon mortgage of lands in New York, valid in such State, and it was held that the contract could not be in violation of usury laws of England, although the money was made payable in the latter country where the rate of interest was less than in New York.

In *Pancost* v. *Trav. Ins Co.*, 79 Ind., p. 179, the notes and mortgage were made in Mississippi, secured upon lands in Indiana where the mortgagor lived, but payable in Connecticut. It is there said: "The mortgagor lives in this State—the lands lie in this State, and from the terms of the mortgage it is clear that the intention of the parties was that the contract was to be enforced in this State. The mortgage could be enforced nowhere else. In such case the law of this State governs, the rate and interest being fixed in accordance with the laws of this State."

See also *Townsend* v. *Riley*, 46 N. H., 300.

Peck v. *Mayo*, 14 Vt., 33.

Arnold v. *Potter*, 22 Iowa, 194.

Under a similar state of facts, in *Fisher* v. *Otis*, 3 Chand. (Wis.) 83; S. C., 3 Pinn. (Wis.) 78, it is said: "The *lex loci contractus* controls the construction and validity of the contract. A contract valid where it is made is valid everywhere except it is shown that the contracting parties intended to be governed by the laws of the country where performance was to be made."

And see *Newman* v. *Kershaw*, 10 Wis., 333–340.

Although it may be regarded as settled that where a contract is made in one country to be performed in another, the *presumption* is that the parties contracted with reference to the laws of the latter, yet, says the Court, in *Brown* v. *Freeland* 34, Miss., 181: "The presumption is never to be indulged that the parties intended, in making their contract, to violate the law; and if there be two laws with reference to which they may contract, and the contract accords with one of the laws, it must be presumed that the parties so intended, because they had their election to mould their contract according to either law; and as the law presumes in favor of a contract and not against it, the presumption must be that the parties had in view the law which will give full effect to their contract."

A Pennsylvania banking corporation agreed in that State, with a citizen of New York, to renew his note held by the bank. A renewal note was made, dated, and payable in New York, and mailed to the bank with a check for the amount of the discount—the rate of discount being according to the law of Pennsylvania, but unlawful in New York. *Held*, not usurious in New York.

Wayne County Savings Bank v. *Low*, 81 N. Y., 566; 37 Amer. Rep. 533.

Thompson v. *Edwards*, 85 Ind., 414, was where a resident of that State applied to a resident of New York for a loan. Notes and a mortgage on lands in Indiana were executed in Indiana, and the money paid to the borrower in Indiana,—some of the notes being payable in New York, and others specifying no place of payment. In a proceeding to foreclose it was contended that the contracts were New York contracts, and as they stipulated for a higher rate than the New York rate, they were for that reason usurious. *Held*, that the plain inference from the evidence was that the bonds and mortgage were executed in Indiana and with reference to the laws of that State, and consequently the usury laws of New York had no application, as a defense. Citing: Wharton Conflict of Laws, secs. 508–510; *Arnold* v. *Potter*, 22 Iowa 194; *Chapman* v. *Robertson*, 6 Paige 627; *Pine* v. *Smith*, 11 Gray 38; *Bank* v. *Lewis*, 45 Barb. 340; *Levy* v. *Levy*, 78 Pa. St. 507 (21 Am. Rep.

35); *Fitch* v. *Remer*, 1 Biss. 337; *Phila. Loan Co.* v. *Towner*, 13 Conn. 249. Rorer on Inter-state Law, page 48.

And in *Cromwell* v. *County of Sac*, 96 U. S., p. 62, it is said: "Where the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern." Cases cited.

Followed in *Dugan* v. *Lewis*, Sup. Court of Texas, 14 S. W. Rep., 1024.

IV.

Of the Defense of Usury.

1. *Usury, a Local Question.*

It is the *lex loci contractus* which governs in respect of usury.

De Wolf v. *Johnson*, 10 Wheaton, 383.

Andrews v. *Pond*, 13 Peters 78.

"The question (respecting interest) is one of local law under a statute of a State, and the construction given by its tribunals should conclude us."

Cromwell v. *County of Sac*, 96 U. S. p. 62.

The note, the basis of the suit, which is said to be usurious, having been made in Iowa, the contract must be governed by the laws of Iowa.

Call v. *Palmer*, 116, U. S. 98.

And whether a contract is usurious or not, must be determined by the law in force at the time of its execution.

Latrobe v. *Hulbert*, (U. S. Circuit Court, S. D. of Ohio, Swing, D. J.), 6 Fed. Rep. 209.

2. *Allegata et Probata.*

The rule is general, and without exception, that an averment or plea of usury, must be proved as laid.

Ewing v. *Howard*, 6 Wall. 499, citing *Marvin* v. *Feeter*, 8 Wend. 533.

Holden v. *Pollard*, 4 Peck 173.

Drake v. *Watson*, 4 Day 37.

Wilmot v. *Monson*, *Ibid.* 114.

Brown v. *Mortgage Co.*, 110 Ill. 235.

Kihlholz v. *Wolf*, 103 Ill. 362.

Phillips v. *Roberts*, 90 Ill. 492.
Telford v. *Garrels*, 132 Ill. 550.

When usury is pleaded in an answer in chancery, and the facts and circumstances constituting it specially set forth, evidence proving a usurious contract different from that alleged in the answer, is inadmissible and insufficient.

Bach v. *Fulton Bank*, 3 Wend., 573.

Any variance between the averments of the plea and the proof, as to the *sum* alleged to be usurious, is fatal.

Smith v. *Brush*, 8 Johns., 84.

And if the defendant fails in proving the usurious contract in the way and manner in which he has charged it in his plea or answer, the defense must fail.

Vroom v. *Ditmas*, 4 Paige Ch. 532, citing *Tate* v. *Wellings*, 2 Durn. and East 531.

3. *Intent, an Essential Ingredient.*

If the transaction, says the Court, in *Bank* v. *Owens*, 2 Peters 527, was in violation of the restriction in the bank's charter limiting its power to "take" more more than 6 per cent. interest, "it could only have been upon the ground of an *intention*" to evade the statute.

So also: "In construing the usury laws, the uniform construction in England has been, (and it is equally applicable here), that to constitute usury within the prohibitions of the law, there must be an *intention* knowingly to contract for or to take usurious interest; for if neither party intend it, but act bona fide and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its face imports usury, as by an express reservation of more than legal interest, there is no room for presumption; for the intent is apparent, *res ipsa loquitur*. But where the contract, on its face, is for legal interest only, there it must be proved that there was some corrupt agreement or device, or shift, to cover usury; and that it was in the full contemplation of the parties." * * * "The *quo animo* is, therefore, an essential indegredient in all cases of this sort."

Bank v. *Waggener*, 9 Peters, 370.
Hotel Co. v. *Wade*, 97 U. S., p. 23.

The requisites of an usurious transaction are three:

1. A loan;

2. A promise to repay the money lent; and

3. The reservation of a greater rate of interest than is allowed by law.

"The intent with which the act is done is an important ingredient to constitute this offense."

Lloyd v. *Scott*, 4 Peters, 205.

The evidence must show a corrupt, guilty *intent* to evade the law.

Acheson v. *Chase*, (Sup. Ct. Minn., 1 Aug. 1881), Alb. Law, Jour., vol. 24, 378.

And, on the part of the lender, to take more than the legal rate of interest.

Palmer v. *Call*, (Cir. Ct. D. of Iowa), 7 Fed. Rep., 737.

"To constitute the offense of usury, there must be an agreement that he who has the use of the money *shall pay to the owner* of it more than lawful interest."

3 Parson's Cont. [6th Ed.], 107.

4. *Discount.*

Is defined by Webster as, "to lend money, deducting interest at the time of the loan."

By Bouvier it is said to be "interest reserved from the amount lent at the time of making the loan."

"The holding back of interest in advance is implied in the phrase (discount) itself; it is a part of the definition of the word." Morse on Banking, [2d Ed.] p. 17.

A discount means, *ex vi termini*, a deduction or drawback made upon an advance or loan of money, upon evidences of debt, payable at a future day.

Fleckner v. *Bank*, 8 Wheat., 350.

Authority to "discount, or make discounts," "from the very force of the terms, necessarily include an authority to take the interest in advance." "We do not know in what other sense the word discount is to be interpreted." *Ibid., p. 354.*

And a deduction in advance, from a note discounted, of the legal rate of interest for the full time the note has to run, (1 year, 11 months, and 5 days, at 6 per cent), is not usurious. *Ibid., p. 350.*

The distinction between *loans* and *discounts* is unsubstantial. "The term 'discount,' as a substantive, means the interest reserved from the amount lent at the time of making the loan; as a verb, it is used to denote the act of giving money for a note or bill of exchange, deducting the interest. In a discount, the interest is reserved, or collected in advance; while in ordinary loans the interest is paid, or agreed to be paid, after it is earned. In either case the tranaction constitutes a loan, and a reservation of interest beyond the specified 8 per cent, is usury."

State of Mo. v. *Boatman's Savings Inst'n*, 48 Mo., 189.

Discounting notes, bonds and bills "is only a mode of loaning money."

Talmadge v. *Pell*. 3 Seld. (N. Y.), 328.

Niagara County Bank v. *Baker*, 15 Ohio St., p. 87.

People v. *Utica Ins. Co.*, 15 Johns., 358, 392.

N. Y. Firemen's Ins. Co. v. *Ely*, 2 Cowen, 678, 699.

F. & M. Bank v. *Baldwin*, 23 Minn., 198, 208.

"With the right to take the interest allowed by law in advance."

Niagara County Bank v. *Baker*, 15 Ohio St., 68.

Discounting in advance 8 per cent. for twelve months is not usurious.

Commercial Bank v. *Nolan*, 7 How. (Miss.), 508.

The policy of the United States, as illustrated in the National Bank act: Among the powers granted thereto is that of "discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt."—R. S., § 6136, cl. 7.

They "may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State * * * where the bank is located." And "when no rate is fixed by the laws of the State, * * * the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, and such interest may be taken in advance," for the time the same has to run.—R. S., § 5197.

This is regarded as a declaration or recognition of a general principle that taking lawful interest in advance, for the time the loan may run, is not unlawful.

Deducting interest in advance for the time the loan may run has never been held usurious in Illinois.

McGill v. *Ware*, 4 Scam., 21. (12 per cent. of $2,500 for 1 year).

Goodrich v. *Reynolds*, 31 Ill., 490. (10 per cent. of $500 for 6 months). Citing *Manhattan* v. *Osgood*, 15 Johns., 162, and

N. Y. Fire Ins. Co. v. *Ely*, 2 Cowan, 678.

Mitchell v. *Lyman*, 77 Ill., 525. (10 per cent. of $3,000 for 1 year):

McGovern v. *Insurance Co.*, 109 Ill., 151. (1 per cent. of $43,000 for 3 years).

Hoyt v. *Pawtucket Inst.*, 110 Ill., 390. (10 per cent. of $500 for 6 months).

Brown v. *Mortgage Co.*, 110 Ill., 235. (1 per cent. of $4,500 for 5 years).

So, reserving domestic "exchange" in excess of the legal rate of interest, in note or bill, is not usurious.

Griffin v. *Marine Co.*, 52 Ill. 130.

Commercial Bank v. *Nolan*, 7 How. (Miss.) p. 537.

And a note for $1,000 due 4 years after date with 8 per cent. annual interest* from this date until paid, principal payable 60 days before maturity thereof, does not show usury upon its face; that the annual interest reserved is to be paid 60 days before the lapse of each year, does not render the transaction usurious, as creditors may require payment of interest in advance.

Telford v. *Garrels*, 132 Ill. 550.

The settled doctrine of the Supreme Court of the United States is, that it is not usurious for bankers to deduct the highest legal rate of interest in advance, for the full time the obligation is to run.

Fleckner v. *Bank*, 8 Wheat. 338. (6 per cent of $10,000, for 1 yr., 11 mo. and 5 da.).

Thornton v. *Bank*, 3 Peters 36.

And after a careful review of the leading American cases, Mr. Tyler, in his work on Usury, thus states the general doctrine: "And the State courts have also held that, to take out interest in advance, or discounting a note without regard to the rules of rebate or discount, is not usurious; and, further, in

* Eight per cent being then the highest legal rate.

this respect there is no distinction between bankers and others. That is to say, it is held that discounting a note at the legal rate of interest and taking the interest in advance, is not usury, either in bankers or others; and this is now the well recognized rule."

Tyler on Usury, 156.

5. *Commissions by Agent or Broker.*

An *agent* is defined as one who acts for, or in the place of another, by authority from him; a substitute; a deputy. Webster's Dic.; Bouvier's L. Dic.—*Agent.*

He is bound to execute the orders of his principal, whenever, for a valuable consideration, he has undertaken to perform them. Bouvier—*Duties and Liabilities.* Citing Story's Agency § 189.

An agent is one who acts for and in the stead of another, termed the principal, either generally or in some particular business or thing, and either after his own discreation in full or in part, or under a specific command.

Bishop on Cont., § 1027.

A *broker*, says Webster, is an agent employed to effect bargains and contracts, as a middle man or negotiator, between other persons, for a compensation commonly called brokerage. He takes no possession of the subject matter of the negotiation. See also Rapalje & L. Dic. And a REAL ESTATE BROKER, the same author defines, as one who buys and sells lands, and negotiates loans, etc., upon mortgage. And by Bouvier, as those who negotiate the sale or purchase of real property. In addition to the above duties they procure loans on mortgage security, attend to leasing and collecting rents, etc. Rapalje & L. Dic.—*Real Estate Broker.*

And Bishop on Contracts, § 1,135, defines a broker as "one who as middle man brings persons together to bargain, or bargains for them in the private purchase or sale of property, not ordinarly in his possession; he has no special property in the goods he may sell, nor, on making a sale has he even implied authority to receive payment."

"An authority to loan money at a legal rate of interest does not include, by implication, the authority to loan it at an illegal rate."

Gokey v. *Knapp*, 44 Iowa 32.

Call v. *Palmer*, 116 U. S., p. 101.

"Brokers negotiating loans of other people's money may charge the borrower commissions without thereby making a loan at the full rate of legal interest usurious." (Citing Ballinger v. Boulard, 87 Ill., 513; Phillips v. Roberts, 90 Ill., 492; Boylston v. Bain. *Ibid* 283). "Payne v. Newcomb, 100 Ill., 611, was not intended to decide anything to the contrary, as seems to be supposed by counsil for plaintiff in error."

Hoyt v. *Pawtucket Inst. for Savings*, 110 Ill. 394.

When an agent, authorized to loan money at lawful interest, exacts for his own benefit more than the lawful rate, without the knowledge or authority of his principal, the loan is not thereby rendered usurious. The loaner of the money must not only be a party to the usurious contract, but he must take the usury.

Call v. *Palmer*, 116 U. S., 98.

And when the evidence fails to show that the commission was paid to the loaner, the defense of usury, based thereon, will not be sustained.

Grant v. *Phœnix Life Ins. Co.*, 121 U. S., p. 117.

Agent's commissions, as an element in usury defenses, has often been before the Supreme Court of Illinois:

1. *Ballenger* v. *Bourland*, 87 Ill., 513. There the agent procured a loan and charged a commission and expenses to borrower, but without the lender's knowledge and not for the lender's benefit, and the Court said it was not usury.

2. *Colehour* v. *State Savings*, 90 Ill., 152. There the debtor paid the creditor $1,500, as commission, for procuring another to advance to the debtor the money then due on the creditor's notes, and a year's extension of time. This was held not to constitute usury.

3. *Boylston* v. *Bain*, 90 Ill., 283. There it is *held*, if the principal does not authorize the agent to charge a greater rate of interest than the law allows, and has no knowledge of the agent's doing so, and the principal does not receive the excess above the legal rate, the defense of usury cannot be sustained. And the Court said, in such case, no unlawful and corrupt intent can be imputed the principal. Citing *Condit* v. *Baldwin*, 21 N. Y. 219, where an agent entrusted with money to in-

vest, exacted a bonus for himself as a condition of the loan, without the knowledge of the principal, and it was held no usury.

This case of *Condit* v. *Baldwin*, although by a divided Court and subject to criticism, has been repeatedly sustained and followed and stands unshaken.

Bell v. *Day*, 32 N. Y. 165.

Esteves v. *Purdy*, 66 N. Y. 446.

Guardian Mut. Insurance Co. v. *Kashaw*, 66 N. Y. 544.

Van Wyck v. *Walters*, N. Y. Crt. App. June 8, 1880, Alb. L. Jour. Vol. 22, 175.

Call v. *Palmer*, 116 U. S. p. 101.

4. *Phillips* v. *Roberts*, 90 Ill. 492. There it was held, a broker, loaning other people's money, has a right to charge a commission to the borrower, without rendering the contract usurious. See also, *Jennings* v. *Hunt*, 6 Bradw. 523.

5. *Payne* v. *Newcomb*, 100 Ill., 611. There the loan agent was required to learn the situation of the property offered as security, to examine and ascertain the title, and became personally liable to the lender for any loss sustained through defective title or overvaluation of the security, and the Court found he was the agent of the lender and his taking a commission from the borrower in excess of the legal rate rendered the contract usurious. But in *Hoyt* v. *Pawtucket*, 110 Ill., on p. 394, it is expressly said, that *Payne* v. *Newcomb*, was not intended to decide that a broker loaning the money of others, could not take a commission from the borrower without rendering the loan usurious.

6. *Kihlholz* v. *Wolf*, 103 Ill., 312. The facts in this case as reported in this volume, or in 8 Bradwell, 371, do not clearly appear; but it would appear the lender paid out, at the request of the borrower, some commissions and expenses to persons procuring the loan, and that in that case the contract was not usurious. "That which is paid as commissions and other expenses was paid by decedent (the lender) to other persons at defendant's request. The payments made to third persons to secure the loans were not of the slightest benefit to him." The ruling appears to be based on the fact that the lender only received legal interest, and the case is distinquished from *Payne* v. *Newcomb*.

7. *Meers* v. *Stevens*, 106 Ill., 549. Here the lender loaned his money through his son, who, on a one year loan took 4 per cent commission above legal interest, and at the end of the year, lender referred borrower to another son who extended the loan and took another commission in excess of interest, and the Court found, that the sons were the agents of the father generally, and the contracts usurious, and say, "the circumstances look very much like a family arrangement to charge usury, and cover it up under the claim of commissions."

8. *McGovern* v. *Mutual Union Ins. Co.*, 109 Ill., 151. Boon was the agent of the Insurance company and negotiated a loan for his principal of $43,000 for three years at 9 per cent to McGovern, evidenced by the latter's note. He charged McGovern, and the same was deducted in advance, for negotiating the loan, a commission of 3 per cent, $1,290, and this was relied upon as usury. "When this loan was made the legal rate of interest was ten per cent per annum when the contract provided for this amount. The loan in this case was for three years at 9 per cent interest. Now, the 3 per cent commissions only amounted to 1 per cent per annum, so that if the commissions are regarded as interest, and added to the interest at 9 per cent provided for the note, the rate would still be only 10 per cent and not usurious."

9. *Hoyt* v. *Pawtucket Institution for Savings*, 110, Ill., 390. Taylor was a loan broker in Chicago. Hoyt made application to the Institution for Savings for a loan of $5,000. at 10 per cent, which being forwarded by Taylor to the Institution, at its residence in Rhode Island, was there accepted, and the loan was paid by the Institution (less $250., one half year's interest, deducted in advance), by a draft to the order of Hoyt himself. Taylor charged Hoyt $250. for commissions for securing the loan, which was paid. This commission, and the agreement therefor, was without the knowledge of the lender, and the Institution got no part thereof, and received no more than 10 per cent. on the money loaned, as evidenced by the note given therefor.

The Court held: 1. Taking interest in advance was not usurious; and 2. That the commissions charged by Taylor did not make the transaction usurious, saying: "The Institution for Savings has never received, or agreed to receive, more

than the legal rate of interest upon this loan, and whatever in addition thereto Hoyt has paid Taylor, has been in compensation for services of Taylor in procuring the loan for Hoyt, which was something entirely between themselves, independent of the Institution for Savings, with which the latter had no connection. We fail to discover anything of usury in the transaction."

10. *Brown* v. *Mortgage Co.*, 110 Ill., 235. Hale & Co., of Chicago, procured a loan from capitalists in Scotland, for Brown, of $4,500, for 5 years at 9 per cent. and the latter gave his note therefor. Brown paid Hale & Co., or the latter deducted from the sum loaned, a commission of $225., and which it was charged, rendered the loan usurious. The evidence, the Court said, did not show Hale & Co. to have been the agents of the lender, adding: "If they were not the company's agents, but were the agents of Brown, in that transaction, although he might have paid them an amount which, added to the current interest upon the note, largely exceeded legal interest, it would not prove usury in the loan. It cannot concern the lender what the borrower pays to his own agents. (*Kihlholz* v. *Wolf*, 103 Ill., 362; *Phillips* v. *Roberts*, 90 Ill., 492). The burden of proving a transaction usurious rests upon the party alleging it. (*Boylston* v. *Bain*, 90 Ill., 283; *Kihlholz* v. *Wolf, supra*). In the next place, at the time this loan was made (July 15, 1875), it was lawful to exact 10 per cent. per annum interest on money loaned. The note given bears interest only at the rate of 9 per cent. per annum, and runs for 5 years. It has been held, and is the well settled law of this Court that it is not usurious to exact the payment of interest in advance. (*Mitchell* v. *Lyman*, 77 Ill., 525; *Goodrich* v. *Reynolds*, 51 Ill., 490; *McGill* v. *Ware*, 4 Scam. 21). One per cent. on $4,500. (the amount borrowed) for 5 years makes just $225.; and so in any view, interest has not been exacted beyond the rate of ten per cent per annum—the then legal rate. *McGovern* v. *Union Mut. Life Ins. Co.*, 109 Ill., 151."

11. *Ammondson* v. *Ryan*, 111 Ill., 506. Mrs. Ryan having money to loan, advertised for borrowers. She had previously arranged with Snowhook to refer borrowers to him for his approval of the offered securities,—his charge therefor to be 2½ per cent. on the amount of the loan. Ammondson applied

directly, and without the aid of Snowhook, to Mrs. Ryan, and procured a loan of $2,000, (time not known), at 10 per cent interest—the highest legal rate. Of the loan the borrower received $1,900, the other $100 being paid to Snowhook, $50 thereof for passing on the abstract of title and drawing up the papers, and $50 for his 2½ per cent. commission. The deduction of the $100 was charged as usurious.

Snowhook's commission of 2½ per cent., says the court, would seem "to have been the proper debt" of Mrs. Ryan, "previously contracted, and the amount previously stipulated for between herself and Snowhook, and the payment of it by the borrower was equivalent to that increased amount of interest being obtained by the lender in addition to the highest legal rate of interest, and so usurious, under the decision of this court in *Payne* v. *Newcomb*, 100 Ill., 611. This in all the usury we discover in the transaction. The payment by the borrower for the examination of the abstract of title and making out the papers, was proper."

12. *Cox* v. *Massachusetts Mutual Life Insurance Co.*, 113 Ill., 382. Tillotson was engaged in the insurance, loan and real estate business, and was the agent of the insurance company, soliciting life insurance therefor, at Bloomington. Cox came to Tillotson's office and applied for a loan of $3,000, (time to run not shown), at 10 per cent. interest, on real estate security, and Tillotson sent forward the application to the insurance company for its acceptance or rejection. The application was accepted, and loan made, the borrower giving his note for $3,000 at 10 per cent. interest, then the highest legal rate, and secured the same upon real estate. Tillotson charged Cox a commission of 5 per cent., $150, and retained the same out of the amount of the loan. There was no evidence showing that the insurance company knew of the agreement as to commissions between Tillotson and Cox, and no part of such commission was received by the company, though it did appear that Tillotson had made a number of loans for the company, substantially as this one was made.

In respect of the commissions the court says: "They were a matter solely between Cox and Tillotson, paid by the former to the latter for his benefit alone, under Cox's employment of Tillotson to obtain the loan for him. There is nothing of usury

in such a transaction. The fact that an agent, without the authority, consent or knowledge of his principal, upon loaning the money of the latter, exacts from the borrower a sum in excess of lawful interest, does not make the loan usurious. (*Phillips* v. *McKellar*, 92 N. Y., 34; *Palmer* v. *Call*, 7 Fed. Rep., 730; *Ballinger* v. *Bourland*, 87 Ill., 513, and authorities there cited; *Phillips* v. *Roberts*, 90 Ill., 492; *Boylston* v. *Bain*, 90 Ill., 283). *Payne* v. *Newcomb*, 100 Ill., 611, referred to by counsel as favoring a contrary view, is quite another case than the one before us, and does not apply to the facts of the present case."

13. *Haldeman* v. *Massachusetts Mutual Life Insurance Co.*, 120 Ill. 390. "The facts of this case, with the exception of the $100 allowed for attorney's fees, are almost the same as the facts in the case of *Cox* v. *Massachusetts Mut. Life Ins. Co.*, 113 Ill., 382. There a commission of $150 was paid on the original loan, and a commission of $75 for the renewal of the loan, and it was held that there was nothing of usury in the charge and payment of such commissions. The question in this case is whether, under a similar state of facts to that which is stated in the *Cox case*, the payment of the commissions above named of $180 (5 per cent. on a $3,600 loan) and $80 (on renewal) constitutes usury. The opinion in the case referred to is decisive of the present case upon the question of usury."

14. *Massachusetts Mut. Life Ins. Co.* v. *Boggs*, 121 Ill., 119. Frisby & Rappleye, of Chicago, were the agents of the insurance company for soliciting insurance, but they also did business as loan agents. Through them Boggs procured two loans from the company, at 10 per cent., the highest legal rate of interest, and paid the agents a commission of 2½ per cent. thereon.

"The facts here," says the Court, "are substantially the same as in *Cox* v. *Massachusetts Mut. Life Ins. Co.*, 113 Ill., 382, where we held that the loan was not usurious, and the ruling there must govern here. * * The insurance company made the loans at 10 per cent. interest, which it had a right to do under the law, and if the borrower saw proper to pay a bonus to some outside party to aid in procuring the money, that is a

transaction which does not, in any manner, have any bearing on the contract under which the insurance company loaned the money."

15. *Telford* v. *Garrels*, 132 Ill., 550. Telford borrowed of Ryhener & Co. $12,000, giving therefor 12 $1,000 notes, drawing 8 per cent. interest, the then highest legal rate, secured on real estate, and paid one Cone a commission of 2 per cent. ($240) for getting the money, and this is charged as usury.

"This depends," says the Court, "upon the question whether or not Cone was the agent of Telford in procuring the loan from Ryhener & Co. If appellant employed Cone to get the money, and paid him a commission for so doing, the lenders cannot, for that reason, be charged with usury. The trial court found that Cone was appellant's agent in the premises and we think that such finding is supported by the evidence. As the appellant alleges usury, the burden was on him to prove it, and it was his duty to establish it by a preponderance of the evidence. He has failed to do so."

16. *Sanford* v. *Kane*, 133 Ill. 199. Kane borrowed of Sanford $500 and gave his note therefor, payable to Sanford in 3 years with 10 per cent. interest, that being the highest legal rate, and secured the same on real estate. Eleven months thereafter Sanford assigned the note to Whittlesey, who, as assignee of the mortgage—not the note, sold under a power and Sanford became the purchaser. On bill to redeem it appeared that Sanford only paid Kane, at the time the loan was effected, $475, retaining the $25 as commission for procuring the loan from Whittlesey. The Court found the money loaned belonged to Sanford, that he took the note and mortgage to himself long before the assignment to Whittlesey, controlling the securities and finally becoming the purchaser, and that the transaction was evidently one "not infrequent where a loan is taken at a high rate of interest and subsequently sold to investors of money," and was usurious.

But, says the Court, "undoubtedly a broker, negotiating loans in good faith from others, may charge the borrower commission without rendering the loan, at full rate of legal interest, usurious. *Hoyt* v. *Pawtucket Inst. for Savings*, 110 Ill., 392; *Phillips* v. *Roberts*, 90 *id.*, 492; *Boylston* v. *Bain*, *Ibid*, 283; *Ballinger* v. *Bourland*, 87 *id.*, 513."

17. *Ryan* v. *Sanford*, 133 Ill, 291. Sanford was a loan broker at Morris, Illinois, and received an application for a loan, $650 at 10 per cent., from Ryan, and the latter agreed to pay Sanford 4 per cent. commission for his services in getting the money. Sanford sent the application to Trowbridge, at Poughkeepsie, N. Y., who accepted it and sent the $650 to Sanford. The loan was evidenced by the note of Ryan, at 10 per cent., secured on real estate, payable to Trowbridge. Sanford deducted his agreed commission, $26, of which Trowbridge had no knowledge, and paid the balance to Ryan, and sent to Trowbridge the note, mortgage (duly recorded) and abstract of title. The taking of the commission was charged to be usury, and in respect thereto the Court says: "The allegation that the transaction out of which the mortgage grew was usurious not only fails of being sustained but is clearly disproved. Trowbridge, the mortgagee, is shown to have advanced out of his own money the entire sum mentioned in the note and mortgage, and the rate of interest agreed to be paid did not exceed the rate at that time allowed by law. If the complainant (Ryan) paid commissions such payments were made to his own agent and are matters of which Trowbridge had no knowledge, and with which he had no concern."

V.

REHEARING.

Entering Orders, etc., Nunc Pro Tunc.

This term, *nunc pro tunc*, is used to denote the doing of a thing at one time which ought to have been performed at another.

The power of the Court over its own records is fully established, and rests upon the soundest principles of justice and equity.

In England, judgments pronounced but not enrolled, were permitted to be enrolled years afterwards, though ordinarily the time was limited to one year.

Lord Mohan's Case, 6 Mod. Rep., p. 59.

Hodges v. *Templer*. Ibid. p. 191.

Blewett v. *Fregonning*, 4 Adolph. & Ellis 1002.

Such action was not indulged where the delay was caused by act of the parties, but only when occasioned by the Court.

Fowler v. *Whadcock*, Barnes' Notes 262.

Chitty's Archibald's Prac. [10th Ed.] p. 1502, [12th Ed.] p. 1572.

Turner v. *London & S. W. Ry. Co.*, 17 L. R. Eq. Cases, p. 566.

As, "where a case stands over for argument from term to term, on account of the multiplicity of business in the court, or for judgment, from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively, to meet the justice of the case."

Lawrence v. *Hodgson*, 1 Younge & Jervis, p. 372, 3.

So, an answer exhibited but not filed, was allowed to be filed *nunc pro tunc*.

Anonymous. 1 Molloy's Repts. (Irish) 462.

And an answer unsworn to be withdrawn, verified and refiled *nunc pro tunc*.

Carter v. *Bosanquet*, 13 Price's Repts., Exchr. 604.

The rule in this country seems to be that the entry of orders, decrees and judgments *nunc pro tunc* do not rest in right, but of favor. Adopting the language of decision:

"It rests in discretion, influenced, in its exercise, by peculiarity of circumstances; and its propriety is not, therefore, to be inquired into by writ of error."

Ley v. *Union Canal*, 5 Watts (Pa.) 104.

In *Insurance Co.* v. *Boon*, 95 U. S., p. 125, the question was, as stated by the Court, "whether the Court could, at the September term, [judgment having been entered at the preceding April term], by an order, correct the record by incorporating into it, *nunc pro tunc*, a special finding of the facts upon which the judgment had been rendered." And it was said:

"It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, or directed to be entered and become of record as of a former term. In *Rhoads* v. *Commonwealth*, 35 Penn. St., 276,

Gibson, C. J., said: 'The old notion that the record remains in the breast of the Court only till the end of the term has yielded to necessity, convenience and common sense. Countless instances of amendment after the term, but ostensibly made during it, are to be found in our own books and those of our neighbors'. Even judgments may be corrected in accordance with the truth. It has been held by this Court that, at a subsequent term, when a judgment had before been arrested, an amendment may be made to apply the verdict to a good count, if another be bad, and the minutes of the judge show that the evidence sustained the good one. *Matheson's Adm'r.* v. *Grant's Adm'r.*, 2 How., 282. And this has repeatedly been held elsewhere. Generally, it may be admitted, that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; *but every court of record has power to amend its records so as to make them conform to and exhibit the truth.*"

So, in case of bills of exceptions, it has, it seems, always been the practice to allow them to be signed *nunc pro tunc.*

Walton v. *United States*, 9 Wheat., 657.

Turner v. *Yates*, 16 How., p. 29.

If the exception is taken upon the trial, the bill may be signed *nunc pro tunc;* and this is in accordance with the practice of courts of error.

Stanton v. *Embrey*, 93 U. S., p. 556.

Hunnecutt v. *Payton*, 102 U. S., p. 353.

Was the action of the court in directing the order allowing the rehearing before a full bench to be entered as of the time when made, justified?

Upon what state of facts the court based its action of a filing *nunc pro tunc*, is not shown by the record.

In such case the rule is that a court of review will presume, in favor of proceedings in a court having jurisdiction of the parties and subject matter, that justice was administered in the ordinary form.

Stockton v. *Bishop*, 4 How. 167.

Townsend v. *Jimison*, 7 How., p. 719.

And its judgment proper.

Bognell v. *Broderick*, 13 Peters, p. 446.

If the proceeding was not in the ordinary form—if the action of the court in delaying the entry of the formal order was caused by the neglect of the parties, and not occasioned by the court's own act, the party complaining of the court's act should have incorporated the facts in the record, that the reviewing court might see that the course adopted by the court was irregular. In the absence of all showing, the presumption of regularity must prevail. Error will not be presumed, it must be shown.

Kearney v. *Denn*, 15 Wall., p. 56.

If the facts were such as to call into exercise the discretion of the court—and in the absence of a contrary showing, such is the legal presumption, the exercise of such discretion is not subject to review.

Terry v. *Commercial Bank*, 92 U. S., 454.

The action of the court in respect of directing the order allowing rehearing to be filed *nunc pro tunc*, not having been challenged in the trial court by objection, exception, or otherwise, no question is presented for review.

Hamilton County v. *Massachusetts*, 6 Wall., p. 636.

SUMMARY.

The legal principles deducible from the authorities are:

1. Under the general comity among States, a private corporation of one State may exercise corporate powers in the several States, unles (*a*) forbidden so to do by its charter, or (*b*) inhibited by the policy of such other State.

2. Where a corporation has entered into a contract unauthorized by its charter, and the same has been performed, that party receiving the benefit of the contract, will not be permitted to rely upon the want of corporate power to defeat an action brought to enforce the contract, by the party having performed it.

3. The remedy, as against a corporation for violations of its charter, rests with and can be invoked by the State alone.

4. The execution of a mortgage to a corporation as security for an indebtedness thereto, is an admission of the legal capacity of the corporation to enforce its rights thereunder, and operates as an estappel to the denial of such power and right.

5. An express grant to a corporation of power to loan money at any rate of interest allowed by law, and to establish agencies in other States for the transaction of its legitimate business, are corporate powers which it may exercise in other States, according to the laws and policy of such other States.

6. The rate of interest or discount which such corporation may legally recover or take, is the rate prescribed by the laws of the State where the contract is made.

7. The *lex loci contractus* controls in determining the validity, construction and interpretation of contracts.

8. Ordinarily, a contract made in one State, to be performed in another, is presumed to have been made in contemplation of the law of the place of performance; but, in a contract for the payment of money, if valid where made, though invalid at the place of payment, the contract will be referred to that law which will sustain it, as an intention to violate the law will never be presumed.

9. So, a contract in good faith for the loaning of money, wherein or whereon no more legal interest is reserved or taken by the law of the place of the contract, will be sustained and enforced, though the rate of interest or discount reserved or taken exceed that allowed by the law of the place of payment.

10. And, if such loan be secured by mortgage upon lands situate at the place of the contract, the parties will be presumed to have contracted in respect of such law, although by the law of the place of payment the rate of interest reserved or taken exceeded the legal rate—the fact that the mortgage could be foreclosed, and the fruits of the security realized, alone within the jurisdiction of the *lex loci contractus*, would, in the absence of a clear showing to the contrary, be conclusive of an intention by the parties that the contract was to be referred to the law of the place where made.

11. Whether or not a contract is usurious, is to be determined by the law of the contract in force at the time of its execution.

12. Usury laws are penal in character and do not operate extra territorally.

13. If the contract is free from usury, according to the law of the contract, this court will adopt the construction and interpretation of the local statutes given by the local tribunals.

This being an Illinois contract, its validity is to be tested by Illinois law, and the construction given that law by the courts of Illinois, will here control.

14. The requisites of an usurious transaction are: 1. A loan. 2. A promise to repay the money borrowed. 3. The reservation or taking of a greater rate of interest or discount than is allowed by law, with intent to evade the statute. In other words, there must be an agreement between the lender and the borrower, that the borrower shall pay to the lender more than lawful interest.

15. If the rate of interest reserved in the contract exceeds the legal rate, the intention to evade the statute will thereby sufficiently appear; but if, upon its face, the contract is free from usury, and facts outside the contract are to be resorted to as showing usury, such facts must be pleaded, and proven as pleaded—to succeed, the defendant must establish, by preponderating evidence, the defense set up and relied upon in his plea or answer.

16. To discount a loan is to withold from the sum of the loan; interest for a given time at a given rate per cent.

17. The discounting of a loan at a rate per cent. per annum not forbidden by the law, for the time the loan is to run, is not, by the law of Illinois, nor is it generally, usurious. And in respect of discounting loans, the right is not confined to bankers.

18. A contract, therefore, by which it is agreed that the sum of the loan shall be discounted at a rate per cent per annum, and for a time named, means, in legal contemplation, that the lender may withhold from the sum of the loan the sum of the discount so produced.

19. The interest and usury laws of Illinois deal alone with the *rate per cent. per annum*, and do not deal with the time nor amounts of loans. What the law forbids, and all it forbids, is "to take, reserve or discount interest," at a rate exceeding 10 per cent. per annum.

20. The withholding from the sum contracted to be loaned, of interest, at a rate per cent per annum not exceeding that fixed by the law, for the time the loan is to run, is, by the law of Illinois, not illegal, and in no way affects the validity of the contract.

21. An agent is one who, being thereto authorized, acts in place of, and as a substitute for, his principal, and, within the limit of his authority, binds his principal.

22. A valid contract of agency must be supported by a good or valuable consideration.

23. It is a legal solecism to assume that an agency can exist, where the alleged agent is charged with no duty and incurs no obligation to the supposed principal, and there is no consideration moving between the parties, and where no act is performed by the alleged agent whereby he assumes to bind the supposed principal.

24. A broker is one, who, as middleman, for a consideration paid or agreed to be paid, brings persons together to bargain, or bargains for them, in private property transactions. He does not have possession of the property the subject of bargain, has no right of property therein, nor, in case of sale, has he even implied authority to make or receive payment.

25. By the law of Illinois, the agent of the borrower may contract with and receive from the borrower, a commission, to be reserved out of the sum of the loan, for his services, and the contract of loan is not affected thereby. What the borrower pays his agent, is no concern of the lender.

26. By the same law, the agent of the lender may contract with the borrower and receive from him a commission for services rendered the borrower in procuring the loan, reserving such commission from the sum of the loan, without rendering the contract of loans usurious; provided, (*a*) the lender is without knowledge of the agreement respecting commission, and (*b*) that he neither contracts for nor receives more than the legal interest. In such case, the corrupt intent to evade the statute, or the corrupt act of receiving illegal interest, both essential, concerning ingredients to constitute usury, are wanting.

27. And by the same law, a real estate broker, with or without the knowledge of the lender, may contract with and receive from the borrower, a commission or brokerage for his services in procuring the loan, without thereby rendering the contract of loan usurious.

28. The power of a court of record over its own records, to make them speak the truth, by the entry of orders, judgments, etc., *nunc pro tunc*, inheres in the court, and is an exercise, not of a right demandable by parties, but of a sound, legal discretion, which, in the absence of recitals in the record showing an abuse of discretion, is not the subject of review.

ARGUMENT.

May it please the Court:

The principal question presented by this record is, was the contract of loaning usurious? In the view taken by counsel and under the authorities, that question is to be determined by a consideration of the interest and usury laws of Illinois, in force at the time the contract was entered into. And in reaching such determination this court will feel bound to accept the construction placed upon the statute of Illinois by the Supreme Court of that State; and this court will the more readily adopt such construction because such construction is in harmony with the general current of American decision.

The Court's attention is first called, however, to the fatal variance between the defense set up in the answer, and the indubitable facts established by the evidence.

The first material fact alleged and relied upon is the agency of Johnston. Unless the evidence shows him to have been the agent of the Trust Company, and as such was a party to the contract of loaning—an active participant in the treaty, and in setting the terms of the negotiation which resulted in the contract, it is evident that such was not the relation he sustained to the Trust Company.

The evidence does not show that Johnston had a dollar of the Company's money in his hands for the purpose of loaning it for the Company or for any purpose whatever. Nor is there a word of testimony tending to show that he was ever instructed, directed or requested, to loan a dollar of the Company's money, nor did he assume to loan the money of the Company, or to do any act whatever—the simplest and most irrelevant, by which to bind the Company. Nor did the defendant understand that Johnston either had the money of the Company for the purpose of loaning it, or was authorized to enter into a contract of loaning for and on behalf of the Company. The formal written

application of the defendant was addressed to the Company at New York, and this application with its accompanying evidence of title, was, as she well knew before the contract was consummated, sent forward to the Company itself for its corporate action thereon. Had Johnston been the agent of the Company in entering into the contract of loaning, he would, himself, under his authority as agent, have determined and informed her that the principal would not loan her $6,000 for *three* years, but would require her to keep the money for *five* years, just as the Company itself, through its corporate agents in New York, did determine and require. So, too, had Johnston been the agent of the Company to settle the terms of the contract of loaning, he and not the Company itself after the application had been sent to it at New York, would have determined that 7 per cent interest should be reserved in the bonds, and that the sum of $694.80 should be discounted for the five years, and deducted in advance from the sum of the loan. The terms of the contract just referred to are of the essence of it, for the defendant claims that therein lies the vice that annuls it. If Johnston was not authorized as the agent of the Company to incorporate into the contract these substantial conditions, and did not in fact prescribe them, it is idle to say that in respect thereof he was the agent of the Company.

Again, as we have shown, a contract of agency, in principle, in no way differs from other contracts. Unless the character of Johnston's agency was such, that upon the discharge by him of the duty imposed by his employment, he could recover for his services, it is manifest, that there existed no contract between him and the Company. The agreement to pay for services to be rendered by an agent, would be a sufficient consideration, no doubt; but when, as here, the alleged principal gives timely notice that he will pay nothing—that he will not and does not demand a service, that he will not and does not direct a service, that he will not and does not pay for a service, the idea, that out of such a condition of affairs an agency can spring, so potent as to vitiate a contract not in fact entered into by the person as agent, is abhorent to law and reason.

The real relation that Johnston sustained to the parties, in the light of the authorities cited, manifestly was that of real estate broker. Every act of his, as also every act of the defendant

and the Company, is consistent with this relation. He was the middle man—the medium of communication, by whom the defendant and the Company were brought together, and through whom all negotiations were carried on. He did not have possession of the property, the subject of negotiation, nor *assume to* bind either party; but, by his mutual aid to both parties, enabled them to agree upon the terms of their contract, and to consummate it. It was the defendant who sought him out, solicited his assistance, and employed him, for an express consideration to be paid, to procure for her the loan of $6,000, upon such terms and security as she could accept and offer. And this is what he did, and all he did.

No significance whatever can be attached to the fact that Johnston drew the draft representing the present value of the securities, upon the basis of the contract of loan—Mrs. Fowler might, with perfect propriety, have drawn it herself; and in selecting this mode of procuring the money to be paid to her in Springfield, Johnston was but performing the usual act of a loan broker, after the parties had concluded their bargaining; and in the performance thereof he must be considered as the agent of and representing the person under whose employment he was acting.

If Johnson was either the agent of the defendant, or was a loan broker, then his contract with the defendant for commissions for procuring the loan in no way affected the contract of loan. This is, as has been shown, the uniform holding of the Supreme Court of Illinois, and such is, also, the whole current of decision.

And it may well be doubted whether a loan broker, employed by the owner to procure a loan of money upon real estate, by any agreement with either of the parties to the loan, could taint a contract of loan with usury that, upon its face, was legal and fair. It is the agreement of loan—the agreement entered into by the borrower and the lender, which must be corrupt, and being corrupt and in evasion of the statute, is inhibited. The usury law takes no cognizance of the contract between the borrower and her agent respecting the services of the latter, and the compensation paid therefor, any more than it does of agreements between the lender and any agent in its employ. So long as the lender neither contracts for nor takes interest

upon his loan in excess of the legal rate, all the parties—lender, borrower, broker—are free to contract as they please, and whatever their contract may be, the contract of loan will be unaffected thereby.

Nor is it at all material that in respect of the account of the present value of the securities, which Johnston made up and mailed to the Trust Company, he attached to his signature the word "Agent." He was under employment by the defendant to procure her a loan on her real estate—for that purpose he was her agent; but this fact, on the hearing in the court below, was relied on as showing that he was the agent of the Trust Company. Had this been a communication from him to the *defendant* upon which she acted, relying upon his agency under authority of the Trust Company, and the latter had accepted the fruits of his acts as such agent, undoubtedly the Company would have been bound by his act, but such is not the case. He is writing to the Company. There was between him and the Company no contract of agency, as the Company well knew, and the Company—the only one who could have been misled by a false representation of agency—is not complaining of any such misrepresentation on the part of Johnston. The Company knew he was a loan broker, and might, perhaps, have inferred that he was acting under employment as agent of the defendant. That he was employed by the defendant is now shown; but at that time the Company had no knowledge of such employment, nor was it under any legal or moral obligation to inquire and ascertain the real fact. It had a right to contract, upon the loan of its money, for the highest legal rate, regardless of any agreement the defendant might have made to pay the intermediary—the loan broker—a commission for procuring the loan.

In every instance where the Supreme Court of Illinois has held the middleman the agent of the lender, such middleman has acted as the substitute for the lender, or was charged with an important duty and obligation to the lender, or the loan was in fact made for his individual benefit.

Having regard, therefore, to the substance and not the shadow, to acts and facts, and not words, it is, as counsel contends, manifest, that the averment in the answer that Johnston was the agent of the Trust Company, and as such was a party

to the contract of loaning, is not sustained. In this respect the variance between the fact pleaded by way of defense, and the proof, is fatal.

But this is not all: It is averred in the original answer, that there was deducted from the sum of the loan, at the time it was made, as agent's commission, the sum of $741.17; and in the amended answer, that at the time the loan was consummated, there was deducted the sum of $1,050, as interest at 3% for five years, and $150 agent's commission; while the fact was, as shown by the evidence, that no deduction whatever was made for account of agent's commissions, and that the actual deduction of $694.80 was the sum of the discount withheld for the five years the loan was to run. Here again, the variance between the averrments of the answer and the proof, is fatal.

But again: In the original answer the averment is, that the defendant received, as the consideration of the securities executed by her, only the sum of $5,256.83, and in the amended answer, only the sum of $4,950.; while the proof shows that the defendant received for such securities, interest at 10 per cent on the full sum of the loan for a month and 22 days, $76.63, and in addition thereto $5,305.20, aggregating $5,381.83. And this variance, counsel insists, is fatal to defendant's contention.

But, aside from the failure of the defendant to establish by a preponderance of the evidence the fact relied upon, that Johnston was the agent of the company in making the contract of loan, and which failure, from its very nature, counsel contends, takes from this case all question of agent's commissions; and the failure of the defendant to establish her averments respect the character and amount of deductions made, and the sum actually received by her from the Company, the material averment, found in the amended answer, that at the time the contract of loan was made, the Company deducted from the sum of the loan and retained, 3% of $6,000., for five years, can, in no sense, be regarded as established by the evidence. Three per cent per annum for 5 years, of $6,000., equals $900. The averment, then, is, that the company deducted from the sum of the loan, the full sum of $900., whereas the sum actually deducted as and for discount for 5 years, was $694.80, and the variance, in this regard, between the fact averred and the

proof, is the substantial sum of $205.20. And the same fatality of variance attends the averment when applied to the rate of discount. The rate per cent per annum averred is, 3% for 5 years, whereas the rate per cent per annum employed to produce the sum discounted, $694.80, is not 3%, but $2\,^{316}/_{1000}$ per cent per annum. Two and $^{316}/_{1000}$ per cent of $6.000, for 5 years exactly produces $694.80, the sum discounted. By which it is made to appear with mathematical certainty, that the difference between the rate per cent per annum averred and proved, for the time stated, is the fraction $^{684}/_{10000}$, reduced to its simplest form, $^{171}/_{250}$ of 1%, and which difference in rate, for the five years, produces the substantial sum of $205.20, as before shown.

The specific charge brought by the defendant against the company, is that it withheld—deducted in advance, interest at the rate 3% for 5 years, under a contract of loan at the rate of 10% for 5 years, 7% of which was reserved in the bonds; and the legal deduction to be drawn from the fact of such discount, it is said, is, that the contract of loan is thereby rendered usurious. If the defendant has failed to prove the fact as averred, whatever else the evidence may show, she has, under the authorities and by the commonest rules of pleading and evidence, failed in her defense, and can take nothing thereby.

Still, directing attention to the matter of variance, counsel observes, that the averment of a corrupt agreement with Johnston, by which a deduction for agent's commissions was effected, necessarily envolves a knowledge of such agreement by the Company. Ordinarily, notice to an agent is notice to his principal; but, under the interest and usury laws of Illinois, as construed by the Supreme Court of that State, and as shown by the cases cited, (and every case decided by the court upon the question is herein cited), if the agent of the lender, *without the knowledge of the lender*, takes for himself commission from the borrower, a contract of loan at the highest legal rate, is not thereby rendered usurious. This being the law of Illinois, in order to maintain the averment of a corrupt agreement in respect of agent's commissions, it was necessary for the defendant, by proof, to establish a knowledge by the company of the agree-

ment of the defendant with Johnston, for the payment of commissions in excess of the highest legal rate of interest reserved or taken. This the defendant wholly failed to do.

Furthermore, the defendant, by her answer sought to challenge the power of the company to loan money in Illinois, at a higher rate of interest than was allowed by the law of Connecticut,—the law of the creation and residence of the company; but defendant wholly failed to prove what the laws of Connecticut were on the subject of interest and usury; and because foreign statutes relied upon and pleaded must be proved, the variance between the averment and proof, in this respect, is fatal to that branch of the defense. And for the same reason the defendant must be held to have abandoned her defense of usury under the New York law, since no proof was offered by her respecting the facts in connection with the Life Assurance Company of New York, or of the statutes of New York respecting interest, usury or security for loans made by a corporation of that State. A reference to the authority cited in the Brief upon the questions above referred to, is all that seems to counsel to be necessary or desirable.

The question of the power of the Trust Company, under its charter, to exercise corporate powers and to loan its money at all in the State of Illinois, if it can be said to arise upon this record, (which counsel does not concede,) would seem of easy solution. By its charter the company is authorized to loan its money "at any rate of interest allowed by law," to secure the same upon real estate, and to transact its legitimate business in other States. In effecting loans in the State of Connecticut, the Company is unquestionably limited, as individuals are there limited, to the rate of interest or discount fixed by the laws of that State; but the moment it passes beyond the boundary of that State; by virtue of the comity among States, being authorized in the State of its creation to loan money and secure the same upon real estate, it may exercise the same power in any other State, loaning money at such rate as may be there lawful, and securing the same upon real estate, as by law is there provided, so long as by so doing it does no violence to the policy of such other State. If, before, the question were at all a

doubtful one, it would seem that the recent decision and opinion of this Court, by Mr. Justice Harlan, and cited in the Brief, has removed all question.

That the action of the Trust Company in going into Illinois, to find profitable and safe investment for its funds, was not violative of any public policy of that State, is, as counsel think, shown by the legislation of that State, copied in the Statement and refered to in the Brief. Indeed, the books of reports of the Supreme Court of Illinois overflow with cases where the rights of foreign corporations, similar to this Trust Company, have been adjudicated and maintained. And if this were not so, it is within the personal knowledge of the court and of counsel, that one of the direst calamities in the world's history was rendered retrievable, by the influx and investment of the capital of foreign corporations, not unlike this Company, upon the faith of the people and laws of Illinois, and that with the knowledge and tacit consent of the State itself; and experience has shown that that confidence was not misplaced.

But if the Company, by loaning its money upon mortgage in Illinois, exercised a power not given it by its charter, still, the law is, as we have seen, that the defendant, having enjoyed the benefits of such contract, cannot be heard in denial of the Company's right to enforce its security. And the law is, also, that by executing the mortgage the defendant admitted the legal capacity of the Company to enforce its provisions, and is estopped from asserting the contrary.

And as respects that branch of the defense founded upon the supposed violation of the usury laws of New York, it need only be said: The fact that the bonds were by their terms payable in New York in no way affected their validity, or the validity of the mortgaged security, since the validity of the contract of loaning, and of the security pledged for the payment of the bonds, depended, not upon the law of New York, but upon the law of Illinois. The contract was made in Illinois, the indebtedness created was secured upon Illinois real estate; and whether or not the contract was valid, and the lien given by the mortgage enforcible, is to be determined by a consideration of the

laws of Illinois. But if this were not so, this feature of the defense must fail, since no evidence was offered in support of the averments underlying it.

The substantive ground of defense in this case, and the only one counsel submits worthy of more than the passing attention of the Court, is that in respect of discount.

The Company was, by law, authorized to contract for interest at the rate of 10 per cent per annum upon its loans.

It reserved 7 per cent in the bonds. The legality of this reservation is not questioned. In addition to the 7 per cent reserved in the bonds, it discounted the loan, for the term of 5 years, at the rate of $2^{316}/_{1000}$ per cent per annum. Did this render the *whole* contract of loan usurious?

To effect such result the Company, by adopting the method it did, must: 1. Have resorted to the *reserving* a part, and *taking* a part of its interest, *with intent* to evade the statute; and, 2. Have reserved and taken more than *at the rate* of 10 per cent per annum; and both these elements must be present. As we have shown, the contract must be a corrupt one—an evasion of the statute, intended to and in fact violating it. Nothing less than this will suffice.

There is call for a refinement of discernment beyond the capacity of counsel, if it can be said that either proposition is fairly maintainable under the established facts of this case, in connection with the law of Illinois as expounded by its highest tribunal.

The same section of the statute which gave this Company the right to *reserve* interest, also gave it the right to *discount* interest. The word "discount" had, at the time it was employed by the legislature of Illinois, a well known legal meaning, and it has the same meaning to-day.

It meant then, and it means now, the withholding of interest from the sum agreed to be loaned at the time of making the loan,—taking interest in advance. The limitation upon the creditor was that the rate per cent. per annum of discount should not exceed the maximum rate fixed by the law. And in every case where this statute has been before the Court, from Scammon's reports to the last unpublished volume of decisions,

the Supreme Court of Illinois has not hesitated or wavered, but has steadily and uniformly said and decided, that for the creditor to take interest in advance was NOT usurious.

If the taking of $2\ ^{316}/_{1000}$ per cent. per annum discount in this case is usurious, it must be because of some distinction in principle between this case and the many cases that have been before that Court. The cases referred to are grouped in the Brief, *ante*, p. 26, and it is there shown that the Supreme Court of Illinois has sustained as legal and not usurious the taking of 12 per cent of $2,500 for 1 year, of 10 per cent of $500 for 6 months, of 10 per cent of $3,000 for 1 year, of 1 per cent of $43,000 for 3 years, of 10 per cent of $500 for 6 months, and of 1 per cent of $4,500 for 5 years; and in no case and under no circumstances known to counsel has that tribunal held the taking of interest, whether taken and withheld as interest in advance, as discount, or as agent's commissions where the interest and such commissions for the time the loan run together did not exceed the legal rate, was usurious, but on the contrary has sustained the taking.

The final decree in this case was predicated, as counsel understand the letter of the Circuit Judge, *ante*, page 10, upon the fact, that the Company had discounted this loan *for 5 years*. It was conceded by the distinguished judge referred to, in that letter of direction, that short time loans might be discounted without violating the Statute; and yet no attempt was there made, as, indeed, none can be, to draw the line of demarkation between a legal and an illegal *time* of discount. What is that short time which is legal? As long ago as the *Fleckner case*, in 8 Wheaton, cited in the Brief p. 26, this Court held that the Bank of the United States might discount an obligation, to the full extent of its charter power respecting interest, 6 per cent for 1 year, 11 months and 5 days; and Illinois, whose law is under consideration, neither in the letter of her Statute nor by construction of her courts, has not drawn or indicated in any way, a time limit upon the right of the loaner or creditor to take interest or discount in advance. And it would seem that the courts of the United States might well say, to a resident and citizen of Illinois, it is impertinent in you

to ask us to place a construction upon the laws of your own State, at variance with the settled holdings of her courts, in a case where no Federal question is involved.

As has been shown, in order that the contract by which this loan was discounted at the rate of $2\,^{316}/_{1000}$ per cent per annum for five years, should be in violation of the statute, it must have been entered into *with intent* to evade the statute. The fact that the discount was taken, is the only fact shown or that can be relied upon. In the light of the language of the Illinois statute, and the repeated declarations of her highest judicial tribunal, is it not an unreasonable and an unwarranted presumption to impute to the parties to this contract an *intention* to evade the statute. It is for the legislature to declare the law, using apt words to that end, and for the courts to construe the words employed. And it would seem, that when the courts had, by a long line of decisions, placed a uniform construction upon the words of the law, the citizen, resident or non-resident, might act upon such construction without having imputed to him an *intention* at variance with such construction. This would be, as counsel think, carrying the doctrine of presumptions to a dangerous extent. Usury laws are, in character, penal; and while every one is presumed to know the law, and to be amenable to its pains when it is violated, the general rule is, that if the offense created by the statute is of that character requiring a union of act and intent, and the character of the act be not such as to raise a legal presumption of intent, the intent must be proved as a substantive fact. So, in cases under the usury laws, if more than the legal *rate* be contracted for or taken, the intent to evade the statute will be presumed, but when the *rate* is legal, no such presumption arises. Here, the legal *rate* was not exceeded. The 7% reserved, and the $2\,^{316}/_{1000}$ per cent taken, were less than the rate which the parties were authorized to contract for; and counsel contends, that in such case the presumption of corrupt intent cannot arise, and proof of such corrupt intent was necessary to invalidate the contract. No such proof is found in this record.

It is also insisted that the decree should have provided and made allowance to the complainant, as for solicitor's fees, such sum as it was provided in the trust deed the trustee might take upon sale under the power.

The trustee died; the successor trustees refused to act; and the legal title of the mortgagor could be divested, and the equitable right of the *cestui que trust* be enforced, only in a court of equity, and the sale contemplated in the trust deed only be made under judicial decree. Under such a state of case, the equitable character of this claim seems undoubted. Counsel is unable to cite any case in precedent, and reliance is placed alone upon the equitable nature of the claim.

It only remains for counsel to speak of the power of courts of record over their own records.

While counsel, at this writing, have had no opportunity of examining the briefs or arguments of counsel for the defendant, it is understood that reliance is placed upon Rule 88 of this Court. For, if that rule can be invoked, and thereby the decree of October 20, 1884, become the final decree in this case, from which no appeal or writ of error will lie, these appeals must be dismissed, to the defendant's great advantage.

Of Rule 88 it is unnecessary to speak, further than to say, that the action of the lower court in restoring to its files a presumably lost order, is not the case provided for in the Rule.

Of the fact, as known to counsel, respecting the action of the Court in directing the order allowing the petition for a rehearing to be filed *nunc pro tunc*, he is not permitted to speak; but as lawyer he may say, that as no facts are disclosed in the record showing under what circumstances that order was made, and that the circumstances were not sufficient to justify the act of the Court, the legal presumption will prevail that the action and proceeding of the Court was regular. For the rule is, that only those errors appearing in the record will be considered by a court of review. Had it been the purpose of the defendant to rely upon a supposed error in the action of the court in this regard, she should have objected thereto at the time, and have preserved her objections and the Court's rulings thereon, in the record. If parties see fit to lie by while adverse or erroneous action is being taken, without invoking the power of the Court then and there to correct the error, the rule is, that all objection is waived, and that the party has elected to abide the action of the Court. And this rule, of universal application counsel

believes, is founded upon obvious principles of justice and common sense. Courts are not thus to be trifled with, nor do the rights of persons, parties litigant, depend upon future caprice.

That the decree in this case, by denying to the Trust Company its right to a recovery for the full amount of the principal expressed in the bonds, and the unpaid interest thereon after maturity according to the contract rate, and by denying relief as to solicitor's fees, is erroneous, counsel insists, has been abundantly shown, and its reversal is demanded by every consideration of justice and equity.

Respectfully submitted,

WILLIAM L. GROSS,

Solicitor for Equitable Trust Company.